Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

THE PEOPLE OF THE STATE OF CALIFORNIA;
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA, *Petitioners*,

v.

DON SOON PARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California prohibits review of claims on state habeas which should have been raised on direct appeal (In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953)), with a state-law exception for a "clear and fundamental constitutional violation striking at the heart of the trial process." In re Harris, 5 Cal.4th 813, 836, 855 P.2d 391 (1993). The adequate and independent state ground doctrine, which precludes federal habeas courts from considering procedurally defaulted claims, "is grounded in concerns of comity and federalism." Coleman v. Thompson, 501 U.S. 722, 730 (1991).

1. Did the Ninth Circuit violate comity by holding that the Dixon rule was not independent of federal law based on its finding that the California Supreme Court "acknowledged" in In re Robbins, 18 Cal.4th 770, 814, n. 34, 959 P.2d 311 (1998), that in determining whether to apply the state-law fundamental-error exception for a Dixon default, the state court necessarily decided the merits of federal claims, despite the state court's assertion in Robbins that "in no event is merit review invariable or obligatory when a procedural bar applies?" Robbins, 18 Cal.4th at 778, n. 1.

2. Did the Ninth Circuit err in concluding that the application of a fundamental-error exception for a state procedural bar renders the bar dependent on federal law, thus contradicting dicta from this Court and creating an intercircuit conflict requiring resolution by this Court?

3. Did the Ninth Circuit violate O'Sullivan v. Boerckel, 526 U.S. 838 (1999), by holding that a prisoner who fails to present his claims on direct appeal does not default those claims in federal court if he later files a state habeas petition in hopes of obtaining discretionary collateral review of the claims?

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

THE PEOPLE OF THE STATE OF CALIFORNIA;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
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DON SOON PARK, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioners, the People of the State of California and the Attorney General of the State of California, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed on January 21, 2000, appears at Appendix A to the petition and is reported at 202 F.3d 1146 (9th Cir. 2000). The first opinion of the court of appeals, filed on January 14, 1999 and withdrawn on January 21, 2000, appears at Appendix B and is reported at 164 F.3d 1226 (9th Cir. 1999). The unreported opinion of the district court appears at Appendix C.

The California Supreme Court's orders denying respondent's petition for review, and denying his petition for writ of habeas corpus on the procedural ground of failure to raise the claims on appeal, appear at Appendix D. The California Court of Appeal's unreported opinion affirming respondent's conviction can be found at Appendix E. The order of the Ninth Circuit Court of Appeals regarding the petition for rehearing appears at Appendix F.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its amended opinion on January 21, 2000, and denied the petition for rehearing and suggestion for rehearing en banc on March 9, 2000. Appendix F. The jurisdiction of this Court is timely invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Don Soon Park was charged in two cases with a total of seven felonies. The charges related to separate criminal incidents against two victims. Four of the crimes involved Munho Kim, and three others involved Keum

Kim. The trial court consolidated the cases over Park's objection.

A jury convicted Park in 1994 of five of the charges, and acquitted him of the other two. Park was found guilty of the four crimes against Munho Kim, including conspiracy to commit robbery, conspiracy to commit burglary, first degree residential burglary, and attempted first degree residential robbery, with a finding that Park was a principal armed with a firearm as to each count. The jury also convicted Park of making terrorist threats against Keum Kim, but acquitted him of the counts charging use of a destructive device to injure or destroy and arson of a structure. The trial court sentenced Park to seven years and eight months in prison on June 1, 1994.

When Park appealed the judgment of conviction, he raised only a single issue. He contended that the state trial court erred in consolidating the charges in the two cases. The California Court of Appeal rejected this claim and affirmed the judgment on September 20, 1995. Appendix E. Park then filed a petition for direct review in the California Supreme Court, again raising only the consolidation claim. The Supreme Court denied the petition for review on November 29, 1995. Appendix D.

Park filed a petition for a writ of habeas corpus in the California Supreme Court on February 2, 1996, raising three entirely new claims he had not presented on direct appeal. Park alleged (1) prosecutorial misconduct in failing to disclose a witness's informant status; (2) abuse of the trial court's discretion in admitting a tape of Park's jailhouse conversations with a co-conspirator into evidence; and (3) denial of the right to a speedy trial and to effective assistance of counsel due to the prosecution's delay in bringing the charges. On March 27, 1996, the California Supreme Court entered the following order regarding Park's habeas petition: "Petition for writ of habeas corpus DENIED. (See In re Dixon (1953) 41 Cal.2d 756, 759, 264 P.2d 513.)" Appendix D.

In Dixon, the California Supreme Court held that the "general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." Dixon, 41 Cal.2d at 759. In In re Harris, 5 Cal.4th 813, 855 P.2d 391 (1993), the Supreme Court clarified the legal standard for the four exceptions it recognizes to forgive a Dixon default, the first of which is an exception for a "clear and fundamental constitutional violation striking at the heart of the trial process." Harris, 5 Cal.3d at 829-36.

Park filed a petition for writ of habeas corpus in the district court on April 22, 1996. 28 U.S.C. § 2254(a). The federal petition presented five claims: (1) erroneous consolidation of the charges; (2) prosecutorial misconduct in failing to disclose that a witness had been a government informant; (3) abuse of discretion by the state trial court in admitting evidence of a secret jailhouse tape; (4) denial of the right to a speedy trial; and (5) ineffective assistance of trial counsel.

In an order filed on September 20, 1996, the district court dismissed the consolidation claim on the merits, holding that Park's federal constitutional rights had not been violated by the joinder of the charges. The district court then dismissed the remaining four claims on the ground that Park had defaulted them on procedural grounds in the California courts by failing to present them on direct appeal, as evidenced by the California Supreme Court's citation of Dixon in denying the state habeas petition. The district court also found that Park had failed to show cause and prejudice to excuse his state default. Appendix C.

Park filed a notice of appeal. Although the district court denied a certificate of probable cause, the court of appeals granted one. While Park's appeal was pending in

the Ninth Circuit, the California Supreme Court issued its decision in In re Robbins, 18 Cal.4th 770, 959 P.2d 311 (1998). In Robbins, the court explained the operation of its "timeliness" bar for habeas petitions, and included other brief comments on various aspects of the court's habeas practices. The court stated that when it imposed the Dixon bar for claims that should have been raised on appeal, the court intended to signify that none of the four state-law exceptions to that bar applied, including the exception for a "clear and fundamental constitutional violation striking at the heart of the trial process." Robbins, 18 Cal.4th at 814, n. 34. The court also stated that "[i]n no event is merit review invariable or obligatory when a procedural bar applies." Id. at 778, n. 1.

On January 14, 1999, the Ninth Circuit filed an opinion affirming in part, reversing in part, and remanding. Appendix B. The court affirmed the district court's rejection of Park's claim that the consolidation of the charges against him in a single trial violated federal due process. However, the Ninth Circuit reversed the district court's order dismissing the remaining claims as procedurally defaulted in state court for failure to raise them on direct appeal. The court held that California's Dixon bar was not independent of federal law, and thus could not bar federal habeas review of federal constitutional claims. The court reached this conclusion by finding that the California Supreme Court had "acknowledged" in Robbins that California's state-law fundamental-constitutional-error exception for procedural defaults encompassed consideration by the state court of the merits of federal constitutional questions, thus requiring the state court to make an "antecedent" ruling on federal law before applying the Dixon bar to any federal constitutional claims. Accordingly, the Ninth Circuit reasoned, every time a California state court reviewed a state habeas petition and found that its own state-law fundamental-error exception did not apply to

forgive a state default, as in this case, the state court had necessarily reached and decided the underlying merits of the federal constitution claim, and had concluded that no federal constitutional error had occurred. Appendix B.

In response to this opinion, the Attorney General filed a petition for rehearing and a suggestion for rehearing en banc. The Attorney General contended that the Ninth Circuit's account of California state law was mistaken in several crucial respects, including a serious misinterpretation of Robbins. Accordingly, the state also filed a motion to certify two questions of state law to the California Supreme Court, including whether, at any time, California law had in fact obligated a state court reviewing a state habeas petition to reach and determine the merits of a federal constitutional claim before imposing a state procedural bar.[1]

On January 21, 2000, the Ninth Circuit issued an amended opinion, correcting several of its errors of state law but reaching the same result. The court affirmed the district court's dismissal of three of Park's claims, including improper consolidation, erroneous admission of the tapes, and ineffective assistance of counsel. However, the Ninth Circuit reversed the district court's order dismissing two of Park's claims on grounds of procedural default, including failure to disclose information about the status of an informant, and denial of the right to speedy trial. Park v. California, et al., 202 F.3d 1146, 1154-55 (9th Cir. 2000).

The Ninth Circuit held that in Robbins, the California

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1. California law permits the state supreme court to "answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth provided that [¶] (1) the certifying court requests the answer; [¶](2) the questions may be determinative of a cause pending in the certifying court; and [¶](3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question." Cal. Rules of Court, Rule 29.5.

Supreme Court "acknowledged" that prior to the date of that decision on August 3, 1998, California appellate courts "necessarily addressed fundamental constitutional claims when applying the Dixon rule." Park, at 1152. Based upon this premise, the federal court held that, since Park raised federal constitutional issues in his state habeas petition, "the denial of Park's petition citing to Dixon was not independent of federal law and does not preclude federal habeas review." Id. The Ninth Circuit summarily denied the motion to certify questions of state law to the California Supreme Court in a footnote. Park, 202 F.3d at 1148, n. 1.

The Attorney General filed a second petition for rehearing and suggestion for rehearing en banc, again urging the court of appeals to certify to the California Supreme Court the question whether California law at any time obligated a state court under Dixon to reach and determine the merits of a federal constitutional claim before imposing a bar. On March 9, 2000, the Ninth Circuit denied the petition for rehearing. Appendix F.

REASONS FOR GRANTING THE WRIT

Federal courts are barred from reviewing on habeas corpus a state prisoner's federal claims if he has defaulted them in state court under an independent and adequate state rule of procedure. Coleman v. Thompson, 501 U.S. 722, 750 (1991). A "habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Id. at 732.

Continuing its systematic dismantling of California's procedural defaults as bars to federal collateral review, the Ninth Circuit has now held that California's most basic appellate bar is not independent of federal law. Certiorari should be granted for three separate reasons.

First, the Ninth Circuit's holding is so broadly stated that it jeopardizes all California state procedural bars imposed in cases prior to August 3, 1998, including more than 500 unresolved capital cases, in which the California Supreme Court frequently disposes of successive, abusive and stale claims on grounds of procedural default.[2] The opinion is also a patent affront to comity.

In common with most jurisdictions, California prohibits collateral review on habeas corpus of claims that could have been raised on direct appeal. In re Dixon, 41 Cal.2d at 759. This is a nearly universal procedural rule, one which this Court has repeatedly upheld. Murray v. Carrier, 477 U.S. 478, 489-91 (1986); Smith v. Murray, 477 U.S. 527, 533-35 (1986); Reed v. Ross, 468 U.S. 1, 10 (1984).

In this case, the Ninth Circuit held that the Dixon rule is not independent of federal law based upon its interpretation of statements in In re Robbins, 18 Cal.4th at 814, n. 34. The Ninth Circuit concluded that in Robbins, the "California Supreme Court recently stated that prior to 1998 it necessarily addressed fundamental constitutional claims when applying the Dixon rule." Park, at 1152. The federal court noted that the California Supreme Court stated that when it imposed the Dixon bar, it meant to signify that the state court had concluded that "none of the four exceptions" to the default rule apply. One of those exceptions is the familiar "fundamental constitutional rights" exception. The Ninth

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2. The jeopardy is not speculative. The decision in this case is spreading rapidly, and its rationale is being used in published cases to invalidate other bars. See Washington v. Cambra, 208 F.3d 832, 833-34 (9th Cir. 2000); Havey v. Hubbard, 2000 U.S. App. LEXIS 8871 (9th Cir. May 1, 2000); La Crosse v. Kernan, 2000 U.S. App. LEXIS 7348 (9th Cir. April 24, 2000)(applied to untimeliness bar); Jackson v. Calderon, 2000 U.S. App. LEXIS 9049 (9th Cir. May 8, 2000)(applied to untimeliness bar in capital case).

Circuit inferred that, in checking to see whether any of the claims stated an exception to the Dixon bar, the state court necessarily reached and decided the merits of all federal claims.

The result of this interpretation of Robbins is perverse. It transforms a commonplace, limited, discretionary state procedural rule into a mandatory, plenary merits review rule for all alleged federal constitutional errors in all cases.

The Ninth Circuit's holding is also profoundly mistaken. It is based on a fundamental misinterpretation of California state law, as well as on unwarranted and inaccurate speculation about the internal practices of the California Supreme Court. This speculation is based upon nothing more than the Ninth Circuit's misinterpretation of a passage about the elements of a legal standard modified in Robbins. The announcement of a modified element of a fundamental constitutional error exception, without more, cannot reasonably be viewed as a statement of historical practice in thousands of California habeas corpus cases.

The Ninth Circuit's misinterpretation of California state law is made completely untenable by its refusal to certify the underlying state-law questions to the California Supreme Court for an authoritative statement of that Court's practice. Instead of turning to the state court for the proper interpretation of state law, the Ninth Circuit insists on its own tendentious and erroneous version of that law. This, too, offends comity.

Second, the opinion in this case is premised upon a basic misapprehension of the operation of traditional state plain/fundamental constitutional error exceptions. Such reviews are simply not interchangeable with a mandatory constitutional merits review. In committing this error, the Ninth Circuit disregarded important dicta from this Court, and created an inter-circuit conflict with most other circuit courts that have considered the validity of state law

plain/fundamental error rules. See e.g., Simpson v. Matesanz, 175 F.3d 200, 209 (1st Cir. 1999). No other circuit has made this rudimentary error, and the conflict created by this decision requires resolution by this Court.

Finally, the Ninth Circuit's decision violates the rule of O'Sullivan v. Boerckel, 526 U.S. 838 (1999), which holds that a prisoner who fails to present his claims in a timely petition for discretionary review to a state court of last resort has not properly presented his claims through the normal established appellate process and therefore defaults his claims as a matter of federal law. Id.at 845, 848.

The Ninth Circuit acknowledges the O'Sullivan rule, but finds it inapplicable by concluding that the O'Sullivan federal bar is lifted when a state court imposes its bar for failure to raise a claim on appeal. The Ninth Circuit held that since California "provided Park a second chance" by giving him the limited opportunity to obtain forgiveness of the state bar, and Park "took advantage of it," the O'Sullivan federal bar was lifted. Park, 202 F.3d at 1153-54. This interpretation turns O'Sullivan on its head.

Under O'Sullivan, Park's failure to avail himself of his normal appellate remedy, in and of itself, meant that he failed to properly exhaust his state remedies, and his claims are now procedurally barred as a matter of federal, not state, law. O'Sullivan, 528 U.S. at 848. Bypassing the normal appellate review system, plain and simple, defaults the claim for federal collateral review purposes, regardless of whether the prisoner later asks the state court to forgive his default by finding an extraordinary exception which might warrant collateral review. Certiorari should also be granted to correct this basic misapplication of O'Sullivan.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED IN HOLDING THAT THE CALIFORNIA SUPREME COURT "ACKNOWLEDGED" THAT IN APPLYING ITS FUNDAMENTAL ERROR EXCEPTION FOR PROCEDURAL BARS, IT NECESSARILY REACHED AND DETERMINED ALL UNDERLYING FEDERAL CONSTITUTIONAL CLAIMS

The decision in this case is based upon an egregious misstatement of California state law. The Ninth Circuit's account of the history of California's procedural bars is rife with errors, and lacks the basic comity due the state court. This decision is only the most recent manifestation of Ninth Circuit's persistent antagonism to California's procedural bars. For several years, the Ninth Circuit has repeatedly invalidated California's basic procedural bars on the ground that they were inadequate to bar federal review.[3] Here, the Ninth Circuit, for the first time, finds a crucial California bar dependent on federal law.

California, like most jurisdictions, requires defendants to raise claims on direct appeal when possible, and bars collateral review of those claims on habeas when they have not been presented on appeal. In re Dixon, 41

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3. The Ninth Circuit has found California's timeliness, successive-petition, and Dixon bars inadequate to bar federal review on many occasions. See Fields v. Calderon, 125 F.3d 757, 765 (9th Cir. 1997)(Dixon bar inadequate); Calderon v. U.S. District Court (Hayes), 103 F.3d 72, 75 (9th Cir. 1996)(Dixon and timeliness bars inadequate); Calderon v. U. S. District Court (Bean), 96 F.3d 1126, 1128-31 (9th Cir. 1996)(timeliness bar inadequate); Morales v. Calderon, 85 F.3d 1387, 1388 (9th Cir. 1996)(timeliness bar inadequate); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994)(successive-petition bar inadequate).

Cal.2d at 759. In 1993, the California Supreme Court reviewed and explained its practice concerning imposition of the Dixon bar, and other bars, in In re Harris, 5 Cal.4th 813, 855 P.2d 391 (1993) and In re Clark, 5 Cal.4th 750, 855 P.2d 729 (1993). In Harris, the California Supreme Court defined the operation of an exception to the Dixon bar which involved a "clear and fundamental constitutional violation striking at the heart of the trial process." Harris, 5 Cal.4th at 836.

While the instant case was pending on appeal in the Ninth Circuit, the California Supreme Court issued its opinion in Robbins, which clarified the operation of the state-law "timeliness" bar. The Supreme Court in Robbins also included several brief comments about its procedures in applying other procedural bars, including the Dixon rule, which bars a claim that should have been raised on appeal.

The Ninth Circuit seized on several of these comments in Robbins to hold that the California Supreme Court had made an

> acknowledgment that the [fundamental] constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, [and that] the California Supreme Court necessarily made an antecedent ruling on federal law before applying the Dixon bar to any federal constitutional claims raised in Park's state habeas petition. That court did so by concluding that no fundamental federal constitutional error had occurred.

Park, at 1153. In other words, the Ninth Circuit finds that for the 45 years after Dixon in 1953 and before Robbins in 1998, the California Supreme Court engaged in the absurdly self-defeating practice of requiring itself and other California courts to reach and decide the merits of a federal constitutional claim in order to determine

whether the claim should be rejected summarily without reaching the merits. Nothing in Robbins, or in the history of California's procedural bar law, justifies ascribing such an inane purpose to the California Supreme Court. There is no support in Robbins for the sweeping conclusion that California's fundamental-constitutional-error exception under Dixon or Harris requires plenary merits review of all constitutional claims in all cases.

On the contrary, the Robbins decision itself emphatically refutes the Ninth Circuit's assumption. In Robbins, the California Supreme Court described the manner in which it had historically conducted a review for procedural bar, before Robbins. The Court stated that,

> although our orders frequently address the merits when procedural bars apply, commonly they do not. Of the approximately 1,500 noncapital habeas corpus petitions disposed of annually by this court, a substantial proportion of our denial orders, representing hundreds of claims, typically rests solely on procedural grounds. In capital habeas corpus matters, although our orders frequently resolve claims both on procedural grounds and on the merits, we have on occasion denied claims solely on procedural grounds. [Citations.] In no event is merit review invariable or obligatory when a procedural bar applies.

Robbins, 18 Cal.4th at 778, n. 1, emphasis added. In this passage, the California Supreme Court explains what it does not do, and has not done, when it reviews a state habeas petition to determine whether to impose a procedural bar. It does not conduct an "invariable or obligatory" merits review. This is a statement of historical practice, not the announcement of a new, prospective procedure. Remarkably, the Ninth Circuit's decision ignores this explicit statement and concludes that the

California Supreme Court states just the opposite in Robbins.

The Attorney General quoted and relied upon this passage in the both his petitions for rehearing. The court of appeals simply ignored the point. By refusing to deal with this unambiguous statement, the Ninth Circuit lost sight of one of the most important limitations on a federal court reviewing state court actions: "the views of the State's highest court with respect to state law are binding on the federal courts." Wainwright v. Goode, 464 U.S. 78, 84 (1983). The Ninth Circuit's rendition of state law is not only inimical to the state's interests in preserving its convictions from stale and piecemeal claims. It also conspicuously contradicts the California Supreme Court's own interpretation of state law.

The underlying premise of the Ninth Circuit's remarkable conclusion comes from the following passage in Robbins, which considers the application of the exception for "error of constitutional magnitude" in Clark[4]:

> Although the [first] exception is phrased in terms of error of constitutional magnitude -- which obviously may include federal constitutional claims -- in applying this exception and finding it inapplicable we shall, in this case and in the future, adopt the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation.

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4. In the first petition for rehearing, the Attorney General pointed out that the panel had mistakenly found that Clark and Harris had "identical" "constitutional error" exceptions." First Pet. for Reh. at 3-11. The panel's second opinion corrects some of the state-law errors in the first opinion, but it nonetheless continues to be based upon a statement in Clark which does not directly apply to Dixon bars.

> Instead, we shall assume, for the purpose of addressing the procedural issue, that a federal constitutional error is stated, and we shall find the exception inapposite if, based upon our application of state law, it cannot be said that the asserted error "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." [Citation.]

Robbins, 18 Cal.4th 811-12.

Nothing in this passage "acknowledges" that a review by a California state court of a state habeas petition prior to August 3, 1998, which involved checking for exceptions to state procedural bars, "encompassed consideration by the court of the merits of federal constitutional questions. . . ." Park, 202 F.3d at 1153. Nothing in this passage says that, before August 3, 1998, the California Supreme Court reached and decided the merits of every federal constitutional claim when it reviewed state habeas petitions. Nothing in this passage even hints that the California Supreme Court actually reached the merits in any previous case, or in any significant number of cases under Dixon or Harris or Clark, let alone in Park's case under Dixon or Harris. In fact, in the footnote attached to this passage, the court used the present tense to explain that "whenever we apply the first three Clark exceptions [including the fundamental constitutional violation exception], we do so exclusively by reference to state law." Robbins, 18 Cal.4th at 811, n. 32, emphasis added. This statement means that, at least since Clark and Harris, the first three California state-law exceptions have been applied with reference to state law. The passage thus completely undercuts the Ninth Circuit's interpretation of Robbins.

In Coleman v. Thompson, this Court cautioned that federal courts reviewing fundamental error exceptions to procedural bars should act only on the basis of explicit

state-court policies. The Court noted that the Virginia Supreme Court had, on one occasion, "reviewed the merits of constitutional claims before deciding whether to dismiss an appeal as untimely." Coleman, 501 U.S. at 742. The Court refused to draw an inference against the overall state practice from that one case:

> There is no evidence other than O'Brien that the Virginia Supreme Court has ever conducted such a review, and O'Brien explicitly declined to announce such a practice. We decline Coleman's invitation to announce such a practice for that court.

Id. at 743-44, emphasis added. In the absence of a clear statement from the California Supreme Court that, prior to Robbins, California courts conducted a merits review of all federal constitutional claims before deciding whether to impose a state procedural bar, the Ninth Circuit should have given heed to this Court's admonition to decline to announce procedural rules for the state court.

Perhaps most remarkably, the court of appeals reached its result despite the ready availability of the certification procedure, which would resolve the underlying state-law question in the state supreme court, where it belongs. Respondent's motion to certify two questions to the California Supreme Court was summarily denied in the Ninth Circuit's second opinion. Park, 202 F.3d at 1148, n. 1. In denying certification, the Ninth Circuit has chosen to adhere to its own mistaken rendition of California's historical procedural bar practice, shunning the definitive account so readily available from the state Supreme Court.

Respondent twice urged the Ninth Circuit to certify the following question to the California Supreme Court:

> At any time, has California law obligated a state court under In re Dixon, [citation], or In re Harris, [citation], to reach and determine the

merits of a federal constitutional claim before imposing a bar?

The Ninth Circuit's entire analysis hinges on its own mistaken answer to this question. This Court should correct that mistake, and avoid the "friction-generating error" brought about by the Ninth Circuit's speculation. Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997). The answer to the question is, in every way, a state-law matter, and it should come from the California Supreme Court, not from the Ninth Circuit.

This Court has strongly endorsed the practice of certifying questions of state law to state courts for their authoritative answers. In Fiore v. White, 120 S. Ct. 469, 473 (1999), this Court certified a question to the Pennsylvania Supreme Court because "the answer to this question will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case." Certification is even more urgently required here, where the Ninth Circuit has indulged in a construction of California state law that threatens to set at naught all remaining state procedural bars imposed before August 3, 1998.

In Arizonans for Official English, the Court held that the district court and the Ninth Circuit erred in refusing to certify questions of state law to the Arizona Supreme Court. The Court cautioned that the certification procedure was designed "to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues. . . ." Id., 520 U.S. at 75. The certification process replaces gratuitous speculation and avoids the risk that the federal tribunal will engage in such needlessly abrasive error with a system designed for "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response" to state-law questions. Id. at 75-76. Granting the state's certification motions would have "save[d] 'time, energy, and resources and help[ed] build a cooperative judicial

federalism.'" Id. at 77. Clearly, then, "the certification requests merited more respectful consideration than they received in the proceedings below." Id. at 78.

The Ninth Circuit has issued an opinion which is breathtaking in its sweep, and ominous in its implications for the remainder of all California's procedural bars imposed before August 3, 1998. There is simply no support for the court of appeals' finding that the plain/fundamental constitutional error exception to the Dixon default rule requires plenary merits review in all cases. On the contrary, there are statements in Robbins itself which completely refute the Ninth Circuit's conclusion. At a bare minimum, however, those statements should have prompted the Ninth Circuit to certify the issue to the California Supreme Court for its account of what it does, and has done, when applying its own exceptions to its own procedural bars. Anything less is an affront to comity.

II.

THE NINTH CIRCUIT'S HOLDING THAT THE APPLICATION OF A FUNDAMENTAL ERROR EXCEPTION FOR A STATE PROCEDURAL BAR RENDERS THE BAR DEPENDENT ON FEDERAL LAW CONFLICTS WITH TWO DECISIONS FROM THIS COURT AND WITH OTHER CIRCUIT DECISIONS

The Ninth Circuit's holding that a state plain/fundamental constitutional error exception is invalid because it is interwoven with federal law sharply conflicts with dicta from two decisions of this Court, and with decisions from many other circuit courts. Those decisions all grasp the distinction between the operation of the fundamental or plain-error exception for procedural bars and a plenary merits review. The Ninth Circuit does not. This conflict merits review on certiorari.

Most federal courts have affirmed the validity of fundamental-error exceptions to state procedural bars. Indeed, this Court has drawn a clear distinction between a review for fundamental error and review for federal constitutional error. In Sochor v. Florida, 504 U.S. 527 (1992), the Court found the suggestion that a review for fundamental error regarding a state bar implied a rejection of a federal constitutional claim an "Olympic stretch." Id., at 534 n. 9. Even more to the point, in Engle v. Isaac, 456 U.S. 107 (1981), this Court approved Ohio's plain-error rule, which excuses procedural defaults "only in 'exceptional circumstances,' such as where, 'but for the error, the outcome of the trial clearly would have been otherwise.' [Citation.]" Id. at 125 n. 27. The Court explained that if Ohio had forgiven the default and

> exercised its discretion to consider respondents' claim, then their initial default would no longer

> block federal review. [Citations.] Our opinions, however, make clear that the States have the primary responsibility to interpret and apply their plain-error rules. Certainly we should not rely upon a state plain-error rule when the State has refused to apply that rule to the very sort of claim at issue.

Id. at 135 n. 44. In this case, the Ninth Circuit has simply lost sight of this important limitation on the reach of a federal habeas court, assuming for itself the responsibility and authority to "interpret and apply" California's procedural bar exceptions. On this ground alone, the Ninth Circuit's decision should be reversed.

Most of the federal circuits which have addressed this issue concur with this Court's remarks in Sochor and Engle. That is, most federal courts understand that a review for "fundamental constitutional error," especially as a possible exception to a state procedural bar, is simply not a merits review.

In many states, including California, the state court applying a procedural bar has discretion to address a defaulted federal constitutional issue "only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue constitutes 'fundamental error.'" Willis v. Aiken, 8 F.3d 556, 562 (7th Cir. 1993). In Willis, the court expressed the widespread understanding that "fundamental error" is "a term of art employed on a fact-specific basis for the purpose of determining whether to excuse noncompliance" with a procedural default. Id. at 566. Citing the Tenth Circuit decision in Gutierrez v. Moriarity, 922 F.2d 1464, 1469 (10th Cir. 1991), the Willis court explained that characterizing the error as "fundamental" "appears to be far more a function of the error's relationship to the policy concerns animating the state's [procedural bar] than of federal constitutional policy concerns." Willis, 8 F.3d at 567. Accordingly, state law mandates "review on the

merits of fundamental rights claims only when the denial of the right 'gives rise to a question of fundamental error as defined by state law.' [Citation]." Id.

Judge Posner explained this point even more directly. In Neal v. Gramley, 99 F.3d 841 (7th Cir. 1996), he noted that Illinois, like California and many other states,

> provides a safety valve for situations in which enforcing a procedural default would mask a plain error. [Citations.] To decide whether an error is plain requires consideration of the merits--but only so far as may be required to determine that issue. It does not open up the merits any wider for consideration by the federal court. [Citations.] It is the same with the closely related Illinois rule relating to fundamental deficiencies in the postconviction process. The determination of deficiency may require a glance at the merits; it does not open up the merits to plenary consideration by the federal court.

Id. at 844. The "fact that the state court in the second round of post-conviction proceedings touched on the merits of Neal's federal constitutional claim does not permit us to disregard the default." Id. at 843. In Park, the Ninth Circuit has obliterated the state "safety valve," and has confused a simple "glance," merely "touching" on allegations of constitutional error, with a comprehensive merits determination.

Most of the federal appellate courts to have considered this issue have avoided the Ninth Circuit's conceptual lapse. See Wilson v. Moore, 178 F.3d 266, 276 (4th Cir. 1999); Simpson v. Matesanz, 175 F.3d 200, 205 (1st Cir. 1999); Tarver v. Hopper, 169 F.3d 710, 712 (11th Cir. 1999); Mu'Min v. Pruett, 125 F.3d 192, 197 (4th Cir. 1997); Andrews v. Deland, 943 F.2d 1162, 1189 (10th Cir. 1991). The reasoning behind the conclusion in these cases was well articulated in McCown v. Callahan, 726 F.2d 1 (1st Cir. 1984). There, the First Circuit concluded that if

federal habeas courts were inclined to find that state fundamental error review undermined state procedural rules,

> the state either would have to convert what is often a speedy reviewing task into a full scale detailed examination of federal law or it would have to abandon "miscarriage of justice" review altogether. The latter alternative seems highly undesirable. The former conflicts with the theory of Wainwright. That is to say, a state's efforts to stop gross miscarriages of justice should not suddenly force it to grapple with complex federal issues that its procedural rules would otherwise lawfully bar.

Id., 726 F.2d at 3-4.

In its determination to invalidate California procedural bars altogether, the Ninth Circuit lost sight of these salutary practical considerations. California's default review is identical in its operation to the plain/fundamental error review in most states with traditional procedural bars. That review is not the same as federal constitutional merits review. For the reasons so strongly articulated by the other circuits, California's Dixon/Harris bar is independent of federal law.

There is no doubt that California has traditionally defined its fundamental error review as a state-law process. In the seminal case of In re Winchester, 53 Cal.2d 528, 348 P.2d 904 (1960), the California Supreme Court explained that, for purposes of ascertaining which claims may be heard in habeas, exceptions are defined "as a miscarriage of justice within the meaning of that phrase as used in section 4 1/2, article VI, of the Constitution of this state." Id. at 531, emphasis added. In Harris, the court observed that "not all alleged constitutional defects warrant the opportunity to relitigate the issue on habeas corpus." Harris, 5 Cal.4th at 830.

Most crucially, however, in Robbins, the case the Ninth Circuit found dispositive, the California Supreme Court noted that, "[i]n no event is merit review invariable or obligatory when a procedural bar applies." Robbins, 18 Cal.4th at 778 n. 1. The Ninth Circuit erred when it failed to defer to the California Supreme Court's interpretation of state law. In particular, the Ninth Circuit violated comity by refusing to defer to the California Supreme Court's statements that fundamental error review is not "mandatory," does not confine itself to federal constitutional error, and does not even consider every allegation of federal constitutional error. Wainwright v. Goode, 464 U.S. at 84. Since California's default review is not the same as federal constitutional merits review, its Dixon bar is independent of federal law. Certiorari should be granted to correct the Ninth Circuit's aberrant and unsound interpretation of fundamental error review, and to resolve the conflict it creates with other circuits.

III.

THE NINTH CIRCUIT VIOLATED O'SULLIVAN V. BOERCKEL BY FINDING THAT THE FILING OF THE STATE HABEAS PETITION LIFTED THE BAR TO FEDERAL COURT REVIEW

The Ninth Circuit's decision also violates the rule of O'Sullivan v. Boerckel, in which this Court held that, as a matter of comity, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id., 526 U.S. at 845. There is no dispute in this case that Park did not afford the California courts that one complete round of appellate review. Under O'Sullivan, where state law has "an established, normal appellate review procedure" (id., at 845), it does not matter whether a state prisoner, after forgoing that procedure, might seek to obtain a merits review on collateral review by attempting to establish a fundamental error exception to the state's procedural rule. Under O'Sullivan, Park's failure to abide by California's Dixon rule requiring appellate presentation of claims, without more, means that he failed to properly exhaust his state remedies, and his claims are now procedurally barred as a matter of federal law. O'Sullivan, at 845-47.

In O'Sullivan, the Court re-emphasized the inseparability of the procedural default doctrine and the exhaustion rule, explaining that vigilant enforcement of a state's procedural default rules is necessary to protect the integrity of the federal exhaustion requirement. Id. at 848. More recently, in Edwards v. Carpenter, 120 S. Ct. 1587, 2000 U.S. LEXIS 2992, *13-14 (2000), the Court reiterated its long-standing policy that the purposes of the exhaustion requirement would be frustrated

> were we to allow federal review to a prisoner who had presented his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it. In such circumstances, though the prisoner would have "concededly exhausted his state remedies," it could hardly be said that, as comity and federalism require, the State had been given a "fair 'opportunity to pass upon [his claims].'" [Citation.]

Id., 2000 U.S. LEXIS 2992, at *14. In this sense Park's failure to abide by California's Dixon rule is the failure of fair presentation described in O'Sullivan and Edwards.

The Ninth Circuit attempts to circumvent O'Sullivan by holding that "it appears as a matter of federal law that Park escaped the inchoate federal habeas consequences of his failure" to exhaust his appellate remedies by filing a state habeas petition. Park, 202 F.3d at 1153. The Ninth Circuit relies on Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991), for the proposition that if "the last state court to be presented with a federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available." The Ninth Circuit concludes that, although Park had no right to a review of his claims, he did have a right to raise his claims, and that is all that § 2254(c) requires. Park, 202 F.3d at 1153-54. This analysis is wrong in two respects.

First, the Ninth Circuit's reliance on Nunnemaker is entirely circular, since it depends on the fallacious premise that the California Supreme Court necessarily reached the merits of Park's habeas petition. Second, and even more importantly, the Ninth Circuit misapprehends the scope of the O'Sullivan bar.

O'Sullivan describes a federal bar imposed upon a finding that the prisoner has not properly presented an appellate claim. The determination of whether to impose that bar does not depend on the complex questions of

independence and adequacy, or the "plain statement" rule of Harris v. Reed, 489 U.S. 255, 269-70 (1989). On the contrary, as this Court explained in Coleman, such rules do

> not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims. See Harris v. Reed, 478 U.S. 255, 269-270, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989)(O'CONNOR, J., concurring); Teague v. Lane, 489 U.S. 288, 297-298, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).

Coleman, 501 U.S. at 735 n. 1, emphasis added. That federal bar goes into effect when the prisoner fails to exhaust his available appellate remedy, as, in this case, when he fails to present his claims on direct appeal. It is not lifted when he seeks the chance for a discretionary collateral hearing on the basis of a state-law exception to a state procedural rule.

This case is even stronger than the situation defined in O'Sullivan. Here, the federal court was not asked to anticipate or predict what the state court might do, since the California Supreme Court has already unambiguously held by citing Dixon that Park defaulted his claims by failing to avail himself of his normal, established appellate remedy.

Under O'Sullivan, Park's claims are unexhausted and therefore procedurally barred. When he failed to present those claims on appeal, and certainly when he was later barred from doing so on habeas by an explicit order from the California Supreme Court, Park reached the dead end described in O'Sullivan. The Ninth Circuit thus erred by

interpreting O'Sullivan to permit the lifting of the federal bar when Park sought a second chance to raise his claims by attempting to qualify for a state-law exception to forgive his default.

IV.

THE NINTH CIRCUIT ERRED BY SUBJECTING CALIFORNIA'S PROCEDURAL RULES TO A MORE STRINGENT STANDARD THAN IT APPLIES TO THE INVOCATION OF A PARALLEL FEDERAL PROCEDURAL DEFAULT RULE

In Coleman, adverting to its own settled acceptance of the vital interest served by federal procedural bars, this Court plainly stated that a state's procedural bars were entitled to the same level of deference, in order to "eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." Coleman, 501 U.S. at 751. The Court has repeatedly insisted that there is "'no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.'" Francis v. Henderson, 425 U.S. 536, 542 (1976), quoting Kaufman v. United States, 394 U.S. 217, 228 (1969).

In Reed v. Farley, 512 U.S. 339 (1994), the Court spoke even more plainly of the need for even-handed treatment of state and federal procedural rules: "We see no reason to afford habeas review to a state prisoner . . . who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated." Id. at 354.

The Ninth Circuit does not administer procedural rules with the impartiality and comity required by this Court. In habeas corpus actions brought be federal prisoners, where its own judgments are at stake, the Ninth Circuit takes a hard line:

> Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal. The Supreme Court has held that where a criminal defendant fails to make allegations of error at trial or on direct appeal he must demonstrate [cause and actual prejudice].

United States v. Dunham, 767 F.2d 1395, 1396 (9th Cir. 1985), citing United States v. Frady, 456 U.S. 152, 168 (1982), and Davis v. United States, 411 U.S. 233, 236-45 (1973); see also United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993) (once defendant's chance to appeal has been waived or exhausted, it is presumed he stands fairly and finally convicted, especially when he already has had a fair opportunity to present his federal claims to a federal forum); Abatino v. United States, 750 F.2d 1442, 1445 (9th Cir. 1984) (where petitioners failed to object at trial and failed to raise of-record issue on direct appeal, they committed a double procedural default).

When it comes to California's parallel procedural rules, however, the Ninth Circuit's hard line is applied against the state courts themselves, not against the defaulting prisoners. This, too, offends comity, and warrants review on certiorari.

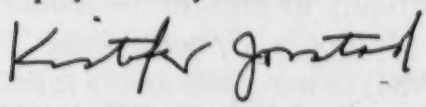
CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 5, 2000.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON SOON PARK, Petitioner-Appellant, v. THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 96-56750 D.C. No. CV-96-02841-JMI(JR) ORDER AND OPINION

Appeal from the United States District Court
for the Central District Of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
October 5, 1998-San Francisco, California

Opinion Filed January 14, 1999
Opinion Withdrawn January 21, 2000

Filed January 21, 2000

Before: Procter Hug, Jr., Chief Judge, Betty B. Fletcher, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that a federal habeas corpus petitioner does not procedurally default a federal constitutional claim when a state supreme court had to decide the issue on the merits before denying habeas relief based on a state procedural rule.

For crimes against Munho Kim in 1991, appellant Don Soon Park was charged with conspiracy, residential burglary, and attempted residential burglary. Based on crimes committed against Keum Kim almost a year later, Park was charged with making terrorists threats, use of a destructive device and explosives to injure/destroy, and arson of a structure.

Over defense objection, the state trial court consolidated the two cases in a single trial. At trial, Michael Nelson, one of Park's confederates, testified for the prosecution regarding Park's involvement in the two sets of crimes. When defense counsel discovered during the trial that Nelson had been a government informant in connection with other matters, the trial court determined that Nelson's informant role did not involve facts that might impeach his testimony, and denied a mistrial motion.

A jury convicted Park of the Munho Kim crimes, and on one count of making terrorist threats, but he was acquitted on the destructive device/explosives crimes against Keum Kim. The California Court of Appeal affirmed, and the California Supreme Court denied discretionary review.

On state habeas corpus, the California Supreme Court summarily denied Park's petition, citing *In re Dixon*, 41 Cal. 2d 756 (1953). *Dixon* held that an inexcusable failure to bring a trial-error claim on direct appeal normally bars consideration of that claim on habeas corpus.

Park brought a federal habeas petition, arguing federal constitutional error in the consolidation of the two sets of charges; prosecutorial misconduct in failing to reveal Nelson's informant status; abuse of discretion by the trial court in allowing the jury to hear audiotapes secretly recorded by Nelson; and denial of his right to a speedy trial.

The district court dismissed the consolidation claim on the merits, ruling that the procedure did not present an issue of federal due process. The court dismissed Park's remaining claims as procedurally defaulted in the California courts.

Park appealed, contending that under California law, the trials should not have been consolidated because evidence relevant to one set of charges would not have been admissible on the other set; the prosecution violated his due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963); consolidation likely inflamed the jury; the trial court should not have admitted the audiotape evidence; and the prosecution combined two weak cases to make one strong one in the aggregate.

[1] Federal habeas was available for improper consolidation only if the simultaneous trial actually rendered Park's state trial fundamentally unfair, and hence violative of due process. The court considers each count separately, asking whether the trial on a particular count was fundamentally unfair in light of that count's joinder with one or more other charges. Park had the burden to prove unfairness.

[2] Federal habeas corpus relief does not lie for errors of state law. Park failed to meet his burden of showing, in federal constitutional terms, that his state trial was fundamentally unfair. The failure of the jury to convict on all counts was the best evidence of the jury's ability to compartmentalize the evidence. The jury did not convict Park on two of the Keum Kim counts, strong evidence that he was not prejudiced by the admission of evidence that was possibly irrelevant with regard to some of the counts.

[3] However, to demonstrate actual unfairness, Park had to show that the jury was actually inflamed. Park made no such showing, and because the jury did not convict on all counts, it presumably was able to compartmentalize the evidence.

[4] If evidence regarding the Keum Kim counts was stronger than evidence regarding Munho Kim, Park presumably would have been convicted on all the Keum Kim counts, and not all the Munho Kim counts, not the other way. Further, the jury must have found Nelson's testimony credible, even in light of a limiting instruction admonishing the jury to view his testimony with distrust. Park's argument that the state's case was weak was not supported by the record.

[5] A district court properly refuses to reach the merits of a habeas petition if the petitioner has defaulted on the state's procedural requirements, and is unable to demonstrate cause and prejudice, or a fundamental miscarriage of justice. [6] However, for the procedural default rule to apply, the state procedural rule must provide an adequate and independent state-law basis on which the state court can deny relief. [7] The rule that the California Supreme Court employed when it denied Park's petition was not independent of federal law with regard to three of Park's claims.

[8] In California, a convicted defendant desiring to bring claims in a state habeas petition must, if possible, have pursued the claims on direct appeal from his conviction. Park did not directly appeal his latter three claims for habeas relief from his state-court conviction, even though those claims arose during his trial and were apparent from the record. If the *Dixon* rule was an adequate and independent state-law ground on which to base a denial of relief, Park normally would have been barred from bringing his petition for failure to appeal from his conviction, *unless* he could establish a recognized ground for relief from his state procedural default.

[9] In the years following *Dixon*, the California Supreme Court established exceptions to the *Dixon* rule and to similar procedural bars--exceptions that permitted consideration on state habeas of some claims even though known but not appealed, or unknown but not timely brought when discovered. A California court will hear the merits of a claim in a state habeas petition, despite the petitioner's failure to bring the claim on direct appeal from the conviction, if the court finds fundamental constitutional error; a lack of fundamental jurisdiction by the trial court over the petitioner; the trial court's acting

in excess of jurisdiction; and an intervening change in the law.

[10] For a state procedural rule to be independent, the state-law ground for decision must be interwoven with federal law. A state-law ground is so interwoven if the state has made application of the procedural bar depend on an antecedent ruling on federal law, such as the determination of whether federal constitutional error has been committed.

[11] The California Supreme Court recently state that prior to 1998, it necessarily addressed fundamental constitutional claims when applying the *Dixon* rule. Therefore, if "fundamental constitutional rights" include federal-law issues, the denial of Park's petition citing to *Dixon* was not independent of federal law, and did not preclude federal habeas review.

[12] At the time of Park's habeas petition, the California Supreme Court's denial based on *Dixon* did not identify a particular procedural rule that completely barred Park's federal constitutional claims. Rather, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's state habeas petition. That court did so by concluding that no fundamental federal constitutional error had occurred. Thus, if any of Park's claims rested on an assertion of a denial of a federal constitutional right, he could not be held to have procedurally defaulted under *Dixon*.

[13] Park should have taken his current claims to the California Supreme Court on direct appeal. His failure to do so rendered those claims both unexhausted and potentially unexhaustible--or procedurally defaulted--because the time for leave to appeal had long passed.

Nevertheless, it appeared as a matter of federal law that Park escaped the federal consequences of his failure by pursuing his new claims on state habeas. This was so because it could be fairly said that through its recognized exception to the *Dixon* rule, California gave him the right "to raise, by any available procedure, the question presented."

[14] Park's second claim, which he brought in his state petition, raised prosecutorial misconduct under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose Nelson's informant status and thereby preventing Park from conducting relevant discovery. *Brady* was based on a federal constitutional due process concern. Park's claim thus alleged federal constitutional error and required the California Supreme Court to address the merits of the federal claim before applying the *Dixon* procedural bar. *Dixon* was not an independent procedural bar as applied to Park's *Brady* claim, so that claim was not procedurally defaulted.

[15] Likewise, Park's third claim, also articulated in his state petition, alleged federal constitutional error in the improper admission at trial of some of the information contained on the tapes. Because this claim alleged a federal constitutional error, the *Dixon* rule was not independent when applied to it. Nevertheless, at the time the tapes were recorded, although Nelson had been charged with a crime, Park was not in custody and had not been charged. Park failed to fulfill his burden adequately to demonstrate that the admission of the tape evidence constituted a violation of due process. Thus, no matter how Park styled the claim, it was not cognizable on federal habeas.

[16] Park's fourth claim, which he also brought in his state petition, raised as a federal constitutional claim the

denial of his right to a speedy trial. Because Park's speedy trial claim alleged federal constitutional error, *Dixon* was not an independent bar as applied to that claim.

COUNSEL

Sharon M. Bunzel, O'Melveny & Myers, San Francisco, California, for the petitioner-appellant.

Carl N. Henry, Deputy Attorney General, Los Angeles, California for the respondents-appellees.

ORDER

The opinion filed January 14, 1999, is hereby WITHDRAWN.

OPINION

TROTT, Circuit Judge:

Don Soon Park seeks review of a decision by the District Court for the Central District of California dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a) (1994). Park's petition contained four claims. The district court dismissed his first claim on the merits, holding that the state court's consolidation for trial of crimes committed on different occasions did not present a federal due process concern. The district court dismissed Park's remaining claims as procedurally defaulted in the California courts. Park could have pursued those claims on direct appeal from his conviction, and the district court concluded that Park's failure to do so constituted a procedural default from which he was not entitled to relief.

Park has since completed his prison sentence on the conviction at issue in this habeas petition. He was thereafter ordered deported based on that conviction and released on bail pending his appeal of the deportation order. Park's release from prison does not moot his habeas petition. *Wood* v. *Hall*, 130 F.3d 373, 376 (9th Cir. 1997). Because he faces deportation, Park suffers actual consequences from his conviction.

We have jurisdiction under 28 U.S.C § 2253 (1994), and we affirm in part, reverse in part, and remand.[5]

I

Background

Park was imprisoned in 1994 in California as the result of five felony convictions stemming from two separate incidents of criminal behavior. For his crimes against Munho Kim, Park was convicted of conspiracy to commit robbery, conspiracy to commit burglary, first degree residential burglary, and attempted first degree residential robbery. For his subsequent crime against Keum Kim, Park was convicted of making terrorist threats, but acquitted of counts charging use of a destructive device and explosives to injure/destroy and burn a structure.

The Munho Kim crimes were the result of a plan hatched by Park, Michael Nelson, and Raymond Sander to rob Munho Kim, who owed Park money. On August 20, 1991, Sander and Nelson followed Munho into his garage and attacked him while Park waited a few blocks away in his automobile. Nelson and Sander abandoned the

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5. Respondents' motion to certify this case to the California Supreme Court is denied.

robbery attempt when Munho's wife entered the garage and screamed, but were detained by the police while trying to flee. Park escaped.

Park's crime against Keum Kim occurred almost a year later. Park had demanded money from Keum on account of a statement by her granddaughter that Park regarded as defamatory, and for a debt owed to Park by Keum's son. Keum refused to pay. Park repeatedly demanded payment over a period of several months, ultimately threatening to bomb Keum's family liquor store and kill Keum and her family. On June 8, 1992, the store owned by Keum's family was destroyed by a pipe bomb.

Michael Nelson cooperated with the police after he was arrested. While still in jail, he participated in two incriminating taped conversations with Park, who was not yet in custody. They discussed the burglary and attempted robbery of Munho Kim. Later, Nelson was released and continued his feigned friendship with Park, the latter not aware of Nelson's role as an informer. Nelson testified that Park then told him of Park's intention to "blow up" Keum's family store.

Over Park's objection, the state trial court allowed the consolidation into one trial of the two sets of alleged crimes.

At Park's trial, Nelson testified against Park, and the incriminating tapes that Nelson had cooperated in making were introduced into evidence. During the trial, Park's counsel discovered that Nelson had been a government informer on other matters, and he moved for a mistrial, arguing that he had been surprised and denied the opportunity to conduct discovery with regard to possible bias. The trial court held an in camera hearing on the extent of Nelson's role as an informer for the police and

denied the motion, concluding that Nelson's role did not involve information which might impeach Nelson's testimony. The court later gave the jury a standard instruction about the suspect credibility of a cooperating witness.

Park was convicted on all four Munho Kim counts and the terrorist threats count from the Keum Kim crimes. Park appealed only the state court's refusal to sever the counts for trial. The California court of appeal affirmed the consolidation. The California Supreme Court denied discretionary review. Park then brought a habeas petition in the California Supreme Court, claiming (1) prosecutorial misconduct for failing to disclose Nelson's informant status, (2) abuse of the trial court's discretion for permitting the secret tapes to be entered into evidence, and (3) denial of the right to a speedy trial. Park's petition variously characterized his claims as violations of both the federal and the California Constitutions and California statutes, citing statutes and provisions of each Constitution as well as case law pertaining to each body of law. On March 27, 1996, the California Supreme Court denied the petition with only this explanation: "Petition for writ of habeas corpus DENIED. (See *In re Dixon* (1953) 41 Cal. 2d 756, 759.)." Dixon stands for the proposition that an inexcusable failure to bring a trial-error claim on direct appeal normally bars consideration of that claim on habeas. We note that the court did not make a clear statement that its decision was based on a bona fide, adequate, and independent ground. See *Harris* v. *Reed*, 489 U.S. 255, 261 (1989).

Park then brought this habeas petition in federal district court, alleging (1) federal constitutional error arising from the consolidation of the sets of counts, (2) prosecutorial misconduct in failing to disclose that Nelson

had been a government informant, (3) abuse of discretion by the California trial court in permitting the jury to hear a secret jailhouse tape, and (4) denial of his right to a speedy trial.

II

Standard of Review

This court reviews a district court's decision to deny an application for a writ of habeas corpus de novo. *United States* v. *Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). Factual findings are reviewed for clear error. *United States* v. *Span*, 75 F.3d 1383, 1386 (9th Cir. 1996).

III

Consolidation of Counts

We attend first to Park's properly exhausted claim that is before us -- the claim that the consolidation in one trial of the crimes for which he was charged violated his federal due process rights.

[1] Federal habeas is available for improper consolidation only if the simultaneous trial "actually render[ed Park]'s state trial fundamentally unfair and hence, violative of due process." *Featherstone* v. *Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991). This court considers each count separately, asking whether "the trial on a particular count was fundamentally unfair in light of that count's joinder with one or more other charges." *Id.* Park has the burden to prove unfairness rising to the level of a due process concern. See *McKenzie* v. *McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994). We hold that Park's arguments fail to fulfill his burden, and we affirm the district court's decision on this claim.

[2] Park argues first that, under California law, the crimes should not have been consolidated because evidence relevant to one set of counts would not have been admissible at a separate trial on the other set of counts. However, a violation of state law standing alone is not cognizable in federal court on habeas. *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.' ") (quoting *Lewis* v. *Jeffers*, 497 U.S. 764, 780 (1990)); *Featherstone*, 948 F.2d at 1503. Park has failed to meet his burden of showing, in federal constitutional terms, that his state trial was fundamentally unfair. We have held that the failure of the jury to convict on all counts is " 'the best evidence of the jury's ability to compartmentalize the evidence.' " *United States* v. *Baker*, 10 F.3d 1374, 1387 (9th Cir. 1993) (quoting *United States* v. *Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987)). The *Baker* rule distinguishes the instant case from our decision in *Bean* v. *Calderon*, 163 F.3d 1073 (9th Cir. 1998). In *Bean*, "no such acquittal offered affirmative evidence of the jury's ability to assess the Schatz and Fox evidence separately." *Id.* at 1086. In the case at bar, by contrast, the jury did not convict Park on two of the Keum Kim counts, strong evidence that he was not prejudiced by the admission of evidence which was possibly irrelevant with regard to some of the counts.

[3] Park next argues that the consolidation was likely to inflame the jury against him. In order to demonstrate actual unfairness, however, Park must show that the jury was actually inflamed. See *Featherstone*, 948 F.2d at 1503. Park makes no such showing and, as discussed above, because the jury did not convict on all counts it presumably was able to compartmentalize the evidence. See *Baker*, 10 F.3d at 1387. This case is entirely unlike *Bean*, where the government continually urged the jury to cross-apply the evidence, the trial court gave only a brief

instruction regarding the need to consider the crimes separately, and the jury convicted on both counts 163 F.3d at 1083-86.

[4] Park argues third that the prosecution combined two weak cases to make a stronger case in the aggregate. This circuit recognizes potential due process concerns when a poorly-supported count is combined with one that is well supported. *Bean*, 163 F.3d at 1084; *United States* v. *Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986). In this case, we do not believe that the evidence supporting the convictions for the separate crimes was that unequal. Park points out that the prosecution did not file charges arising from the Munho Kim incident until after the Keum Kim crimes were committed. However, if evidence regarding the Keum Kim counts was stronger than evidence regarding the Munho Kim counts, Park presumably would have been convicted on all of the Keum Kim counts and not all of the Munho Kim counts, not the other way. Further, the record indicates that the jury must have found Nelson's testimony credible, even in the light of a limiting instruction admonishing the jury to view his testimony with distrust. Nelson's testimony was a large part of the government's case against Park on the Munho Kim counts. Park's argument that the state's case was weak is not supported by the record.

IV

Procedural Default

[5] A district court properly refuses to reach the merits of a habeas petition if the petitioner has defaulted on the particular state's procedural requirements and is unable to demonstrate cause and prejudice or a fundamental miscarriage of justice. See also *O'Sullivan* v.

Boerckel, 119 S. Ct. 1728 (1999); *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). As the Court said in *O'Sullivan*,

> [b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must [properly] exhaust his remedies in state court. In other words, the state prisoner must give the state court an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.

Id. at 1731. If a prisoner has not given the state court an opportunity to act on his claims, and the time to do so has expired, then the prisoner with a federal habeas petition and no valid excuse for his defalcation will normally encounter closed jurisdictional doors at the federal courthouse. *Id.* at 1734.

[6] Relying on its understanding of *Dixon*, the district court held Park's remaining claims procedurally defaulted and did not consider their merits. For the procedural default rule to apply, however, the application of the state procedural rule must provide "an adequate and independent state law basis" on which the state court can deny relief. *Coleman* v. *Thompson*, 501 U.S. at 729-30; *Fields* v. *Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). In that connection,

> "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Coleman, 501 U.S. at 733 (quoting *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983), which established a presumption made applicable to habeas corpus review by *Harris* v. *Reed*, 489 U.S. 255, 262 (1989)). If indeed the state court of last resort did exercise its opportunity to act on his federal constitutional claims, then no procedural default occurred that would bar federal review of those claims.

[7] An application of these rules to Park's claims convinces us that the rule employed by the California Supreme Court when it denied Park's petition was not independent of federal law with regard to three of Park's claims. Accordingly, we reverse the district court's decision on two dismissed claims, but we affirm on the third claim on different grounds.

A

California's *Dixon* Rule

[8] In California, a convicted defendant desiring to bring claims in a state habeas petition, must, if possible, have pursued the claims on direct appeal from his conviction. See *Exparte Dixon*, 264 P.2d 513, 515 (Cal. 1953). This requirement is called the Dixon rule. Park did not directly appeal his latter three claims for habeas relief from his state court conviction even though those claims arose during his trial and were apparent from the record. If the *Dixon* rule was an adequate[6] and independent

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6. Park argues that the *Dixon* rule was not an adequate basis for the California Supreme Court to deny review at the time of his appeal from his conviction. Because we hold that the *Dixon* rule was not independent as applied to Park's claims, we do not decide here whether Dixon was an adequate state ground for default. *Cf. Fields* v. *Calderon*, 125 F.3d 757, 760 (9th Cir. 1997).

state law ground on which to base a denial by the California Supreme Court of state habeas relief, Park normally would be barred from bringing this petition for failure to include the claims in the appeal from his conviction, see *Dixon*, 264 P.2d at 515, unless he could establish a recognized ground for relief from his state procedural default.

[9] In the years following *Dixon*, the California Supreme Court in a number of cases established exceptions to the original *Dixon* rule and to other similar procedural bars -- exceptions which permitted the consideration on state habeas of some claims even though known but not appealed, or unknown but not timely brought when discovered. However, because the exceptions to its procedural bars had become undefined and imprecise over the years, the California Supreme Court in 1993 decided a pair of cases -- *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993) -- designed to govern California courts' exercise of discretion when applying, respectively, (1) the *Dixon* default rule, and (2) the longstanding but unclear bar of "untimeliness" for recently discovered claims not apparent from the record. These decisions were intended to "reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions." *Fields*, 125 F.3d at 763-64. Specifically, a California court operating under *In re Harris* and *In re Clark* would hear the merits of a claim in a state habeas petition, despite the petitioner's failure to bring the claim on direct appeal from the conviction, if the court found one of four exceptions. These exceptions are: (1) "'fundamental constitutional error,'" (2) a lack of "'fundamental jurisdiction'" by the trial court over the petitioner, (3) the trial court's "'acting in excess of jurisdiction,' " and (4) an intervening " 'change in the law.'"

Fields, 125 F.3d at 763 (quoting *In re Harris*, 855 P.2d at 398-407).[7]

B

Independence

[10] For a state procedural rule to be "independent," the state law ground for decision must not be "interwoven with the federal law." *Long*, 463 U.S. at 1040-41; see *Reed*, 489 U.S. at 265 (applying *Long* to federal habeas cases). Otherwise, the state may fairly be said to have examined the federal claim. A state law ground is so interwoven if "the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985).

[11] *In re Harris's* "fundamental constitutional error" exception to the *Dixon* bar permitted a hearing on the merits of a state habeas petition "when the habeas corpus petitioner claims a violation of his or her fundamental constitutional rights." 855 P.2d at 398-99. The California Supreme Court recently stated that prior to 1998 it necessarily addressed fundamental constitutional claims when applying the *Dixon* rule. *In re Robbins*, 959 P.2d 311,

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7. *In re Clark*, 855 P.2d 729 (Cal. 1993), dealt specifically with the bar of "untimeliness," a separate and distinct bar from the *Dixon* rule. See *In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998). The Robbins court explained that the four exceptions stated in *In re Harris* applied to the *Dixon* rule and to a procedural bar set out in *In re Waltreus*, 397 P.2d 1001 (Cal. 1965). *Robbins*, 959 P.2d at 340 n.34. Four exceptions set out in *In re Clark*, of which one was likewise a "fundamental constitutional error" exception, applied to the untimeliness bar. *Id.*

338 (Cal. 1998) ("When, in our orders, we impose the bars of *Dixon* [or] *Waltreus*, . . . this signifies that *we have concluded* that none of the four exceptions set out in [*In re Harris*] apply." (emphasis added)). Therefore, if "fundamental constitutional rights" include federal-law issues, the denial of Park's petition citing to *Dixon* was not independent of federal law and does not preclude federal habeas review. See *Reed*, 489 U.S. at 262-63.

No question can exist that *In re Harris* defined fundamental constitutional error by reference to federal law. The *Harris* court stated that fundamental constitutional error implicates "the individual's right . . . to a fair trial under both the state and federal Constitutions." 855 P.2d at 399. The court then cited *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), to clarify the definition of fundamental constitutional error. *Harris*, 855 P.2d at 402.

The California Supreme Court has adopted in *Robbins* a stance from which it will now decline to consider federal law when deciding whether claims are procedurally defaulted. *Id.* at 339.[8] We do not decide here whether *Robbins* establishes the independence of California's *Dixon* rule for the future. *Robbins* is clear,

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8. *Robbins* says that the California courts will now "assume, for the purpose of addressing the procedural issue, that a federal constitutional error is *stated*, and we shall find [the first *In re Clark*] exception inapposite if, based upon our application of state law, it cannot be said that the asserted error 'led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner.' " *Id.* at 339 (quoting *In re CLark*, 855 P.2d at 761) (emphasis added). The purpose of this approach was to establish the adequacy and independence of the State Supreme Court's future *Dixon/Robbins* rulings and to indicate that a prisoner seeking collateral relief with respect to new federal claims no longer had any recourse to exhaust in the state courts.

however, that its new approach is prospective, and would not have applied when the California Supreme Court denied Park's habeas petition. See *id.* at 338-39 ("[W]e shall, in this case and in the future, *adopt the following* approach as our standard practice." (emphasis added)).

[12] Accordingly, at the time of Park's habeas petition, the California Supreme Court's terse denial based on *Dixon* did not identify a "particular procedural rule that completely barred" Park's federal constitutional claims. *Siripongs* v. *Calderon*, 35 F.3d 1308, 1317 (9th Cir. 1994). Rather, in light of *Robbins's* acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's state habeas petition. That court did so by concluding that no fundamental federal constitutional error had occurred. Thus, if any of Park's claims rested on an assertion of a denial of a federal constitutional right, he cannot be held to have procedurally defaulted under *Dixon*.

C

The Right to Raise a Claim

[13] According to *O'Sullivan* and § 2254(c), Park should have taken his current claims to the California Supreme Court on direct appeal. To quote the Court: "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 119 S. Ct. at 1732. His failure to do so temporarily rendered those claims both unexhausted and potentially unexhaustible -- or

procedurally defaulted -- because the time for leave to appeal "has long passed." *Id.* at 1733. Nevertheless, it appears as a matter of federal law that Park escaped the inchoate federal habeas consequences of his failure by subsequently pursuing his new claims on state habeas. This is so because it can be fairly said under § 2254(c) that California, through its recognized exception to the *Dixon* rule, gave him the right "to raise, by any available procedure, the question presented." As Justice Scalia said for the Court in *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), "State procedural bars are not immortal . . . they may expire because of later actions by state courts. If the last state court to be presented with a federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available." *Id.* at 801.[9] Park may have had no right to a *review* of his claims in the California Supreme Court, but he did under *Dixon* have a "right . . . to *raise* his claims before that court. That is all § 2254(c) requires." *O'Sullivan*, 119 S. Ct. at 1732 (internal quotations omitted) (emphasis added). In effect, California provided Park a second chance, and for our purposes, he took advantage of it. Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims. Moreover, as we have demonstrated, the California Supreme Court at the time this case came before it did examine Park's claims for fundamental constitutional error; and that, too, is all that is required to exhaust a claim and to avoid procedural default. This analysis may no longer be the case after *Robbins*, but Park surely gave the state court the "first opportunity to review his claim and provide any necessary relief." *O'Sullivan*, 119 S. Ct.at 1732; see also *Coleman*, 501 U.S. at 731 (stating the key inquiry to be whether the state courts had an

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9. As in *Ylst*, we assume that the rule that a discretionary denial of review cannot lift a preexisting procedural bar did not exist in California in 1994. See *id.* at 802 n.2.

"opportunity . . . to correct a constitutional violation . . . .").

D

Park's Claims

1

[14] Park's second claim in the instant petition, which he brought in his state petition, raised prosecutorial misconduct under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose Nelson's informant status and thereby preventing Park from conducting relevant discovery. *Brady* was based on the federal constitutional due process concern associated with the prosecution's failure to disclose a witness's informant status. 373 U.S. at 85. Park's claim thus alleged federal constitutional error and required the California Supreme Court to address the merits of the federal claim before applying the *Dixon* procedural bar. *Harris*, 855 P.2d at 399. *Dixon* was not an independent procedural bar as applied to Park's *Brady* claim, so this claim was not procedurally defaulted.

2

[15] Likewise, Park's third claim, also articulated in his state petition, alleges federal constitutional error in the improper admission at his trial of some of the information contained on the jailhouse tapes. Because this claim alleges a federal constitutional error, the *Dixon* rule is not independent when applied to it. Nevertheless, admission of evidence is a state law concern, unless the state trial court's decision is error rising to the level of a due process violation. *McGuire*, 502 U.S. at 67. Other than citing to the Fifth, Ninth, and Fourteenth Amendments, Park's arguments all relate to California law relevancy standards

for admitting evidence. At the time that the tapes were recorded, although Nelson had been charged with a crime, Park was not in custody and had not been charged. We hold that Park failed to fulfill his burden adequately to allege and demonstrate that the admission of the tape recorded evidence of guilt constituted a violation of due process. See *Smith* v. *Stewart*, 140 F.3d 1263, 1272 (9th Cir.1998). Thus, although we consider this claim not to have been procedurally defaulted, no matter how Park styles the claim, it is not cognizable on federal habeas.

3

[16] Finally, Park's fourth claim in the instant petition, which he also brought in his state petition, raised as a federal constitutional claim the denial of his right to a speedy trial. Park cited to *Barker* v. *Wingo*, 407 U.S. 514 (1972), which articulated the test for a federal constitutional claim of the denial of a right to a speedy trial. *Id.* at 530-33. Because Park's speedy trial claim alleged federal constitutional error, *Dixon* was not an independent bar as applied to this claim. We reverse the district court's holding of procedural default on Park's *Brady* and speedy trial claims, and hold that Park's admission of evidence claim was not procedurally defaulted but affirm on the ground that Park did not adequately allege a due process violation in his federal petition.

V

Park's Remaining Arguments

In the briefs and at argument on this appeal, Park's counsel discussed claims of ineffective assistance of trial and appellate counsel. Park's argument in this regard was that the delay from the alleged denial of his right to a

speedy trial necessarily detracted from his counsel's ability to defend him. However, Park did not raise ineffective assistance of trial counsel as an independent claim in either his state or the current petition.

In his state petition, Park raised ineffective assistance of counsel only as an excuse for his failure to bring claims on direct appeal. We could entertain this argument as "cause" for Park's procedural default, excusing the default only if Park could demonstrate prejudice and had exhausted this claim in state court. See *Murray* v. *Carrier*, 477 U.S. 478, 488-89 (1986). Because we do not hold any of Park's claims procedurally defaulted, however, we do not reach the cause and prejudice exception. We do not consider either ineffective assistance of counsel arguments because Park did not properly raise them as claims in the instant petition.

VI

Conclusion

For the foregoing reasons, we affirm the district court in holding that Park's improper consolidation claim fails on the merits. We reverse as to Park's *Brady* and speedy trial claims and hold that those claims were not procedurally defaulted at the state level. We affirm as to Park's improper admission of evidence claim on the grounds that Park failed to adequately allege and prove a due process violation, and affirm with regard to Park's remaining claims because Park did not present claims of ineffective assistance of trial or appellate counsel in his federal petition.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON SOON PARK, Petitioner-Appellant, v. THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 96-56750 D.C. No. CV-96-02841-JMI(JR) OPINION

Appeal from the United States District Court
for the Central District Of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
October 5, 1998-San Francisco, California

Filed January 14, 1999

Before: Procter Hug, Jr., Chief Judge, Betty B. Fletcher, and Stephen S. Trott, Circuit Judges

Opinion by Judge Trott

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that a federal habeas corpus petitioner does not procedurally default a federal constitutional claim when a state supreme court had to decide the issue on the merits before denying habeas relief based on a state procedural rule.

For crimes against Munho Kim in 1991, appellant Don Soon Park was charged with conspiracy, residential burglary, and attempted residential burglary. Based on crimes committed against Keum Kim almost a year later, Park was charged with making terrorists threats, and use of a destructive device and explosives to injure/destroy, and arson of a structure.

Over defense objection, the state trial court consolidated the two cases in a single trial. At trial, Michael Nelson, one of Park's confederates, testified for the prosecution regarding Park's involvement in the two sets of crimes. When defense counsel discovered during the trial that Nelson had been a government informant in connection with other matters, the trial court determined that Nelson's informant role did not involve facts that might impeach his testimony, and denied a mistrial motion.

A jury convicted Park of the Munho Kim crimes, and on one count of making terrorist threats, but he was acquitted on the destructive device/explosives crimes

against Keum Kim. The California Court of Appeal affirmed, and the California Supreme Court denied review.

On state habeas corpus, the California Supreme Court summarily denied Park's petition, citing *In re Dixon*, 41 C. 2d 756 (1953). *Dixon* held that for a petitioner to assert a claim in a state habeas petition, he had to, if possible, have pursued the claim on direct appeal from his conviction.

Park brought a federal habeas petition, arguing error under California law in the consolidation of the two sets of charges; prosecutorial misconduct in failing to reveal Nelson's informant status; abuse of discretion by the trial court in allowing the jury to hear audiotapes secretly recorded by Nelson; and denial of his right to a speedy trial.

The district court dismissed the consolidation claim on the merits, ruling that the procedure did not present an issue of federal due process. The court dismissed Park's remaining claims as procedurally defaulted in the California courts.

Park appealed, contending that under California law, the trials should not have been consolidated because evidence relevant to one set of charges would not have been admissible on the other set; the prosecution violated his due process rights under *Brady* v.*Maryland*, 373 U.S. 83 (1963); consolidation likely inflamed the jury; the trial court should not have admitted the audiotape evidence; and the prosecution combined two weak cases to make one strong one in the aggregate.

[1] Federal habeas was available for improper consolidation only if the simultaneous trial actually rendered Park's state trial fundamentally unfair, and hence violative of due process. The court considers each count separately, asking whether the trial on a particular count was fundamentally unfair in light of that count's joinder with one or more other charges. Park had the burden to prove unfairness.

[2] Federal habeas corpus relief does not lie for errors of state law. Park failed to meet his burden of showing, in federal constitutional terms, that his state trial was fundamentally unfair. The failure of the jury to convict on all counts was the best evidence of the jury's ability to compartmentalize the evidence. The jury did not convict Park on two of the Keum Kim counts, strong evidence that he was not prejudiced by the admission of evidence that was possibly irrelevant with regard to some of the counts.

[3] However, to demonstrate actual unfairness, Park had to show that the jury was actually inflamed. Park made no such showing, and because the jury did not convict on all counts, it presumably was able to compartmentalize the evidence.

[4] If evidence regarding the Keum Kim counts was stronger than evidence regarding Munho Kim, Park presumably would have been convicted on all the Keum Kim counts, and not all the Munho Kim counts, not the other way. Further, the jury found Nelson's testimony credible, even in light of a limiting instruction admonishing the jury to view his testimony with distrust. Park's argument that the state's case was weak was not supported by the record.

[5] A district court properly refuses to reach the merits of a habeas petition if the petitioner has defaulted on the state's procedural requirements. For the procedural default rule to apply, the state procedural rule must provide an adequate and independent state-law basis on which the state court can deny relief. The rule that the California Supreme Court followed when holding Park's claim procedurally defaulted was not independent with regard to three of Park's claims.

[6] If at the time of Park's failure to appeal the *Dixon* rule was an adequate and independent ground on which to base a denial of relief, and the California Supreme Court unambiguously relied on *Dixon*, Park would have been barred from bringing this petition for failure to appeal from his conviction, unless he could establish grounds for relief from his default.

[7] In the years following *Dixon*, the California Supreme Court carved exceptions to the *Dixon* rule. A California court will hear the merits of a claim in a state habeas petition, despite the petitioner's failure to bring the claim on direct appeal from the conviction, if the court finds fundamental constitutional error.

[8] For a state procedural rule to be independent, the state-law ground for decision must not be interwoven with federal law. A state-law ground is so interwoven if the state has made application of the procedural bar depend on an antecedent ruling on federal law, such as the determination of whether federal constitutional error has been committed.

[9] The California Supreme Court recently stated that the constitutional error exception may include federal constitutional claims. The court's statement serves as an acknowledgement that the "fundamental constitutional

error" exception to its *Dixon* procedural default rule renders that bar interwoven with the merits of federal claims.

[10] At the time of Park's habeas petition, the California Supreme Court's denial based on *Dixon* did not identify a particular procedural rule that completely barred Park's federal constitutional claims. Rather, in light of the acknowledgement that the constitutional error exception required California courts to consider the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's state habeas petition. Thus, if any of Park's claims rested on an assertion of a denial of a federal constitutional right, he could not be held to have procedurally defaulted under *Dixon*.

[11] Park's second claim, which he brought in his state petition raised prosecutorial misconduct under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose Nelson's informant status and thereby preventing Park from conducting relevant discovery. *Brady* was based on a federal constitutional due process concern. Park's claim thus alleged federal constitutional error and required the California Supreme Court to address the merits of the federal claim before applying the *Dixon* procedural bar. Dixon was not an independent procedural bar as applied to Park's Brady claim, so that claim was not procedurally defaulted.

[12] Likewise, Park's third claim, also articulated in his state petition, alleged federal constitutional error in the improper admission at trial of some of the information contained on the tapes. Because this claim alleged a federal constitutional error, the *Dixon* rule was not independent when applied to it. Nevertheless, at the time

the tapes were recorded, although Nelson had been charged with a crime, Park was not in custody and had not been charged. Park failed to fulfill his burden adequately to demonstrate that the admission of the tape evidence constituted a violation of due process. Thus, no matter how Park styled the claim, it was not cognizable on federal habeas.

[13] Park's fourth claim, which he also brought in his state petition, raised as a federal constitutional claim the denial of his right to a speedy trial. Because Park's speedy trial claim alleged federal constitutional error, Dixon was not an independent bar as applied to that claim.

COUNSEL

Sharon M. Bunzel, O'Melveny & Myers, San Francisco, California, for the petitioner-appellant.

Carl N. Henry, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

TROTT, Circuit Judge:

Don Soon Park seeks review of a decision by the District Court for the Central District of California dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a) (1994). Park brought five claims before the district court. The district court dismissed Park's first claim on the merits, holding that the state court's consolidation for trial of crimes committed on different occasions did not present a federal due process

concern. The district court dismissed Park's remaining claims as procedurally defaulted in the California courts. Unlike the claim of improper consolidation, Park had not brought those claims on direct appeal from his conviction, and the district court concluded that Park did not qualify for relief from his default by having demonstrated either cause and prejudice or actual innocence. We have jurisdiction under 28 U.S.C. § 2253 (1994), and we affirm in part, reverse in part, and remand.

I

Background

Park is incarcerated in California after convictions on five counts stemming from two separate incidents of criminal behavior. For his crimes against Munho Kim, Park was convicted of conspiracy to commit robbery, conspiracy to commit burglary, first degree residential burglary, and attempted first degree residential robbery. For his subsequent crime against Keum Kim, Park was convicted on one count of making terrorist threats but acquitted on counts of use of a destructive device and explosives to injure/destroy and arson of a structure.

The Munho Kim crimes were the result of a plan hatched by Park, Michael Nelson, and Raymond Sander to rob Munho Kim, who owed Park money. On August 20, 1991, Sander and Nelson followed Munho into his garage and attacked him while Park waited a few blocks away in his automobile. Nelson and Sander abandoned the robbery attempt when Munho's wife entered the garage and screamed, but were detained by the police while trying to flee. Park escaped.

Park's crime against Keum Kim occurred almost a year later. Park demanded money from Keum on account

of a statement by her granddaughter that Park found defamatory and for a debt owed to Park by Keum's son. Keum refused to pay. Park repeatedly demanded payment over a period of several months, ultimately threatening to bomb Keum's family liquor store and kill Keum and her family. On June 8, 1992, the store owned by Keum's family was destroyed by a pipe bomb.

Nelson pled guilty to his involvement in the Munho Kim crimes and cooperated with police, participating in two inculpatory taped conversations while still in jail with Park, who was not in custody, discussing the burglary and attempted robbery. Nelson was released and continued his friendship with Park, the latter not aware of Nelson's cooperation with the police. Nelson testified that Park then informed him of Park's intention to "blow up" Keum's family store.

At Park's trial, Nelson testified against Park, and the tapes that Nelson had cooperated in making were introduced into evidence. Park's counsel discovered at trial that Nelson had been a government informant on other matters and moved for a mistrial, arguing that he had been surprised and denied the opportunity to conduct discovery with regard to possible bias. The trial court held an in camera hearing on the extent of Nelson's role as an informant for the police and denied the motion, concluding that Nelson's informant role did not involve information which might impeach Nelson's testimony. The court later gave the jury a standard instruction warning them about the suspect credibility of a cooperating witness.

The state trial court, over Park's objection, permitted the state to consolidate the two sets of crimes into one trial, and Park was convicted on all four Munho Kim counts and the terrorist threats count from the Keum Kim

crimes. Park appealed the state court's refusal to sever the counts for trial. The appellate court affirmed the consolidation. The California Supreme Court denied review. Park then brought a habeas petition in the California Supreme Court, claiming prosecutorial misconduct for failing to disclose Nelson's informant status, abuse of the trial court's discretion for permitting the secret tapes to be entered into evidence, and denial of the right to a speedy trial. Park's petition variously characterized his claims as violations of both the federal and the California constitutions and California statutes, citing statutes and provisions of each constitution and caselaw pertaining to each body of law. The California Supreme Court denied the petition with only this explanation: "Petition for writ of habeas corpus DENIED. (See *In re Dixon* (1953) 41 Cal. 2d 756, 759.)." Park then brought this habeas petition in federal district court, arguing error under California state law in consolidating the sets of counts, prosecutorial misconduct in failing to disclose that Nelson had been a government informant, abuse of discretion by the California trial court in permitting the jury to hear a secret jailhouse tape, and denial of his right to a speedy trial.

II

Standard of Review

This court reviews a district court's decision to deny an application for a writ of habeas corpus de novo. *United States* v. *Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). Factual findings are reviewed for clear error. *United States* v. *Span*, 75 F.3d 1383, 1386 (9th Cir. 1996).

III

Consolidation of Counts

[1] Federal habeas is available for improper consolidation only if the simultaneous trial "actually render[ed Park]'s state trial fundamentally unfair and hence, violative of due process." *Featherstone* v. *Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991). This court considers each count separately, asking whether "the trial on a particular count was fundamentally unfair in light of that count's joinder with one or more other charges." *Id*. Park has the burden to prove unfairness rising to the level of a due process concern. See *McKenzie* v. *McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994). We hold that Park's arguments fail to fulfill his burden and affirm the district court's decision on this claim.

[2] Park argues first that, under California law, the crimes should not have been consolidated because evidence relevant to one set of counts would not have been admissible at a separate trial on the other set of counts. However, a violation of state law standing alone is not cognizable in federal court on habeas. *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.' ") (quoting *Lewis* v. *Jeffers*, 497 U.S. 764, 780 (1990)); *Featherstone*, 948 F.2d at 1503. Park has failed to meet his burden of showing, in federal constitutional terms, that his state trial was fundamentally unfair. We have held that the failure of the jury to convict on all counts is " 'the best evidence of the jury's ability to compartmentalize the evidence.' " *United States* v. *Baker*, 10 F.3d 1374, 1387 (9th Cir. 1993) (quoting *United States* v. *Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987)). The jury did not convict Park on two of the Keum Kim counts, strong evidence that he was not prejudiced by the

admission of evidence which was possibly irrelevant with regard to some of the counts.

[3] Park next argues that the consolidation was likely to inflame the jury against him. In order to demonstrate actual unfairness, however, Park must show that the jury was actually inflamed. See *Featherstone*, 948 F.2d at 1503. Park makes no such showing and, as discussed above, because the jury did not convict on all counts it presumably was able to compartmentalize the evidence. See *Baker*, 10 F.3d at 1387.

[4] Park argues third that the prosecution combined two weak cases to make a stronger case in the aggregate. This circuit recognizes potential due process concerns when a poorly supported count is combined with one that is well supported. *United States* v. *Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986). Park points out that the prosecution did not file charges on the Munho Kim counts until after the Keum Kim crimes were committed. However, if evidence regarding the Keum Kim counts was stronger than evidence regarding the Munho Kim counts Park presumably would have been convicted on all of the Keum Kim counts and not all of the Munho Kim counts, not the other way. Further, the record indicates that the jury found Nelson's testimony credible, even in the light of a limiting instruction admonishing the jury to view his testimony with distrust. Nelson's testimony was a large part of the government's case against Park on the Munho Kim counts. Park's argument that the state's case was weak is not supported by the record.

IV

Procedural Default

[5] The district court held Park's remaining claims procedurally defaulted and did not consider their merits. A district court properly refuses to reach the merits of a habeas petition if the petitioner has defaulted on the particular state's procedural requirements. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). For the procedural default rule to apply, the state procedural rule must provide an adequate and independent state law basis on which the state court can deny relief. *Id.* at 729-30; *Fields* v. *Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). We hold that the rule that the California Supreme Court followed when holding Park's claims procedurally defaulted was not independent with regard to three of Park's claims. Accordingly, we reverse the district court's decision on two claims. We affirm on the third claim on different grounds.

A

California's Dixon Rule

[6] In California, for Park to bring claims in a state habeas petition, he must, if possible, have pursued the claims on direct appeal from his conviction. See *Ex parte Dixon*, 264 P.2d 513, 515 (Cal. 1953). This requirement is called the *Dixon* rule. Park did not appeal his latter four claims for habeas relief from his state court conviction. If at the time of Park's failure to appeal the *Dixon* rule was an adequate[1] and independent ground on which to base

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1. Park argues that the *Dixon* rule was not an adequate basis for the California Supreme Court to deny review at the time of his appeal from his conviction. Because we hold that the *Dixon* rule was not independent as applied to Park's claims, we do not decide

a denial of relief, and the California Supreme Court unambiguously relied on *Dixon*, Park would be barred from bringing this petition for failure to appeal from his conviction, see *Dixon*, 264 P.2d at 515, unless he could establish grounds for relief from his default.

[7] In the years following *Dixon*, the California Supreme Court carved exceptions to the *Dixon* rule and other procedural bars in individual cases. See *In re Clark*, 855 P.2d 729, 740 (Cal. 1993). Terming its various procedural bars" discretionary," the court noted that strong justification could warrant an exception to a procedural bar. Id.; *In re Harris*, 855 P.2d 391, 398 (Cal. 1993). Because the exceptions to its procedural bars had become obscured over the years, the State Supreme Court in its 1993 *Harris* and *Clark* decisions set specific standards to govern California courts' exercise of discretion when applying, respectively, the *Dixon* rule and the bar of "untimeliness." The decisions were intended to "reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions." *Fields*, 125 F.3d at 763-64. Specifically, a California court will hear the merits of a claim in a state habeas petition, despite the petitioner's failure to bring the claim on direct appeal from the conviction, if the court finds one of four exceptions. These exceptions are: (1) "'fundamental constitutional error,'" (2) a lack of "'fundamental jurisdiction'" by the trial court over the petitioner, (3) the trial court's "'acting in excess of jurisdiction,' " and (4) an intervening " 'change in the law.'" Id. at 763 (quoting *Harris*, 855 P.2d at 398-407).[2]

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whether *Dixon* was an adequate state ground for default.

2. *In re Clark*, 855 P.2d 729 (Cal. 1993), dealt specifically with the bar of "untimeliness," a separate and distinct bar from the *Dixon* rule. See *In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998). The Robbins

B

Independence

[8] For a state procedural rule to be "independent," the state law ground for decision must not be "interwoven with the federal law." *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983); see *Harris* v. *Reed*, 489 U.S. 255, 265 (1989) (applying Long to federal habeas cases). Otherwise, the state may fairly be said to have examined the federal claim, eliminating the concept of procedural default. A state law ground is so interwoven if "the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985).

[9] The California Supreme Court just recently stated that Clark's constitutional error exception "obviously may include federal constitutional claims." *In re Robbins*, 959 P.2d 311, 338 (Cal. 1998). As discussed in note two, above, the *Harris* constitutional error exception is identical to that in *Clark*. The California Supreme Court's statement with regard to *Clark* serves as an acknowledgment that the Harris "fundamental constitutional error" exception to its *Dixon* procedural default rule renders that bar interwoven with the merits of federal claims. See *Robbins*, 959 P.2d at 339 n.32, 340 n.34.

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court explained that the four exceptions stated in *Harris* applied to the *Dixon* rule and to a procedural bar set out in In re Waltreus, 397 P.2d 1001 (Cal. 1965). *Robbins*, 959 P.2d at 340 n.34. Four exceptions set out in *Clark*, of which one was likewise a "fundamental constitutional error" exception, applied to the untimeliness bar. *Id.*

The California Supreme Court has adopted in *Robbins* a stance from which it will now decline to consider federal law when deciding whether claims are procedurally defaulted. *Id.* at 339. We express no opinion here as to whether *Robbins* establishes the independence of California's *Harris*, *Clark*, and *Dixon* rules for the future. *Robbins* is clear, however, that its new approach is prospective, and would not have applied when the California Supreme Court denied Park's habeas petition. See id. at 338-39 ("[W]e shall, in this case and in the future, *adopt* the following approach as our standard practice." (emphasis added)).

[10] Accordingly, at the time of Park's habeas petition, the California Supreme Court's denial based on *Dixon* did not identify a "particular procedural rule that completely barred" Park's federal constitutional claims. *Siripongs* v. *Calderon*, 35 F.3d 1308, 1317 (9th Cir. 1994). Rather, in light of *Robbins'* acknowledgment that the constitutional error exception required California courts to consider the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's state habeas petition. Thus, if any of Park's claims rested on an assertion of a denial of a federal constitutional right, he cannot be held to have procedurally defaulted under *Dixon*.

[11] Park's second claim in the instant petition, which he brought in his state petition, raised prosecutorial misconduct under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose Nelson's informant status and thereby preventing Park from conducting relevant discovery. *Brady* was based on the federal constitutional due process concern associated with the prosecution's failure to disclose a witness's informant status. 373 U.S. at 85. Park's

claim thus alleged federal constitutional error and required the California Supreme Court to address the merits of the federal claim before applying the *Dixon* procedural bar. *Robbins*, 959 P.2d at 340 n.34. *Dixon* was not an independent procedural bar as applied to Park's *Brady* claim, so this claim was not procedurally defaulted.

[12] Likewise, Park's third claim, also articulated in his state petition, alleges federal constitutional error in the improper admission at his trial of some of the information contained on the jailhouse tapes. Because this claim alleges a federal constitutional error, the *Dixon* rule is not independent when applied to it. Nevertheless, admission of evidence is a state law concern, unless the state trial court's decision is error rising to the level of a due process violation. *McGuire*, 502 U.S. at 67. Other than citing to the Fifth, Ninth, and Fourteenth Amendments, Park's arguments all relate to California law relevancy standards for admitting evidence. At the time that the tapes were recorded, although Nelson had been charged with a crime, Park was not in custody and had not been charged. We hold that Park failed to fulfill his burden adequately to allege and demonstrate that the admission of the tape recorded evidence of guilt constituted a violation of due process. See *Smith* v. *Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998). Thus, although we consider this claim not to have been procedurally defaulted, no matter how Park styles the claim, it is not cognizable on federal habeas.

[13] Finally, Park's fourth claim in the instant petition, which he also brought in his state petition, raised as a federal constitutional claim the denial of his right to a speedy trial. Park cited to *Barker* v. *Wingo*, 407 U.S. 514 (1972), which articulated the test for a federal constitutional claim of the denial of a right to a speedy trial. *Id.* at 530-33. Because Park's speedy trial claim

alleged federal constitutional error, *Dixon* was not an independent bar as applied to this claim.

We reverse the district court's holding of procedural default on Park's Brady and speedy trial claims, and hold that Park's admission of evidence claim was not procedurally defaulted but affirm on the ground that Park did not adequately allege a due process violation in his federal petition.

V

Park's Remaining Arguments

In the briefs and at argument on this appeal, Park's counsel discussed claims of ineffective assistance of trial and appellate counsel. Park's argument in this regard was that the delay from the alleged denial of his right to a speedy trial necessarily detracted from his counsel's ability to defend him. Park did not raise ineffective assistance of trial counsel as an independent claim in either his state or the current petition.

In his state petition, Park raised ineffective assistance of counsel only as an excuse for his failure to bring claims on direct appeal. We could entertain this argument as "cause" for Park's procedural default, excusing the default only if Park could demonstrate prejudice had exhausted this claim in state court. See *Murray* v. *Carrier*, 477 U.S. 478, 488-89 (1986). Because we do not hold any of Park's claims procedurally defaulted, however, we do not reach the cause and prejudice exception. We do not consider either ineffective assistance of counsel arguments because Park did not raise them as claims in the instant petition.

VI

Conclusion

For the foregoing reasons, we affirm the district court in holding that Park's improper consolidation claim fails on the merits. We reverse as to Park's Brady and speedy trial claims and hold that those claims were not procedurally defaulted at the state level. We affirm as to Park's improper admission of evidence claim on the grounds that Park failed to adequately allege and prove a due process violation, and affirm with regard to Park's remaining claims because Park did not present claims of ineffective assistance of trial or appellate counsel in his federal petition.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

FILED JULY 15, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK, Petitioner, v. DON R. HILL (WARDEN) AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA DANIEL E. LUNGREN Respondents.	No. CV 96-2841-JMI(JR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON STATE PRISONER'S PETITION FOR WRIT OF HABEAS CORPUS

The Magistrate Judge to whom this matter is assigned submits this Report and Recommendation to the Honorable James M. Ideman, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and General Order 194 for the Central District of California.

BACKGROUND

Viewing the facts most favorably to the prosecution, as this court must in this habeas corpus proceedings, Jackson v. Virginia, 433 U.S. 307, 326, 99 S.Ct. 2781, 2793, reh. denied, 444 U.S. 890, 100 S.Ct. 195 (1979), the record discloses the following[1]:

In March and April 1991, Petitioner Don Soon Park ("Park") hired Messrs. Nelson and Sander as security guards in one of his nightclubs. Numho Kim owed Park money. Park told Nelson about a plan to: follow Kim home at night, restrain him with duct tape, threaten him with a gun, and rob him of the money. Park recruited Nelson and Sander into a conspiracy to commit the robbery. Between May and August 1991, Park, Nelson and Sander unsuccessfully tried twice to carry out their plans. On August 20, 1991, Park Nelson, and Sander went, as planned, near Kim's house at about midnight. Kim arrived home. Sander and Nelson followed Kim into the garage, where Sander began hitting Kim. Kim's wife entered the garage and screamed. Sander and Nelson left. Park, who drove separately, escaped. The police stopped and arrested Nelson and Sander.

The evidence concerning the threats and bombing established that Park had known Mr. and Mrs. Soo Young Hong, their children, and Mr. Soo's mother for some time. Mr. Soo owed Park money. Park was dating Mrs. Soo during her separation from Mr. Soo. Sometime prior to May 11, 1992, Park and Mrs. Soo asked Nelson to kill Mr. Soo. Nelson refused. Park then told Nelson he

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1. The facts set forth in this opinion rely on the California Court of Appeal's summary. [See Return To Petition For Writ Of Habeas Corpus And Memorandum Of Points And Authorities In Support Thereof, filed May 23, 1996 (Ret."), Exh. B, pp. B40-B42.]

was going to "blow up" Mrs. Soo's house, Mr. Soo's mother's house, and Mr. Soo's store. Sometime before the store was bombed, Park had a disagreement over a remark with Mr. Soo's mother. Park blamed Mr. Soo's mother for the remark and repeatedly demanded monetary compensation from her. A few days before the store bombing, Park telephoned Mr. Soo's mother and told her if she did not pay he would not leave her family alone, bomb her store, and kill her and her family. Mr. Soo's mother took Park's threats seriously and notified the police. On June 8, 1992, a galvanized pipe bomb blew up the store.

On March 26, 1993, the District Attorney filed a four count information in case No. BA067141 concerning the incident at Mr. Kim's house, charging Park with conspiracy to commit robbery Cal. Pen. Code §§ 182(a)(1), 211 (Count 1)[2], conspiracy to commit burglary Cal. Pen. Code §§ 182(a)(1), 459 (Count 2), first degree residential burglary Cal. Pen. Code § 459 (Count 3), and attempted first degree residential burglary. Cal. Pen. Code §§ 211, 664 (Count 4). On July 28, 1993, the prosecutor filed an amended information in Case No. BA059736 regarding the threats and store bombing against the Soos and alleging that Park made terrorist threats, Cal. Pen. Code § 422, (Count 5), used a destructive device and explosive to injure or destroy property, Cal. Pen. Code § 12303.4 (Count 6), and arson of a structure. Cal. Pen. Code §451(c) (Count 7).

On April 8, 1993, the prosecutor filed a motion to consolidate case number BA067141 with number

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2. Even though the prosecution initially filed two separate cases, for sake of simplicity, all numbered counts here refer to the counts as they were numbered in the consolidated action in which the jury convicted Park.

BA059736 because both cases charged assaultive behavior, the evidence was cross-admissible, and the consolidation would result in the efficient use of court time. Following a hearing, the court ordered the two cases consolidated. The court found:

> "[T]he issues in case No. BA067141 [counts 5-7] are similar to the issues and charges in this action [counts 1-4 in case No. BA059736]. The court hereby consolidates said cases over the defense objection . . .."

[See Ret., Exh. B, p. B42.] The trial court consolidated the complaints into a single case of seven counts.

In proving its case at trial, the prosecution relied heavily on the testimony of Nelson and played for the jury a secret tape recording Nelson made of a confession Park made while the two of them were in jail together. In his defense, Park presented character witnesses, including Mr. Soo's wife, who said he was not capable of committing any of the crimes.

The jury convicted of Counts 1-5 and acquitted him of Counts 6 and 7. Further, the jury found to be true the special allegations that Park was a principal who was armed with a firearm in count 1-4. Cal. Pen. Code § 12022(a)(1).

After the jury convicted him, Park appealed, raising in the Court of Appeal the arguments that the trial court improperly joined Counts 1-4 (Case No. BA059736) with Counts 5-7 (Case No. BA067141 and that the joinder prejudiced Park. The Court of Appeal affirmed the conviction. [Ret., Exhs. A-B.] Park raised the same contentions in a Petition for Review before the California Supreme Court, which the Court denied without citation

to authority. [Ret., Exh. C; Am. Exh. C to Ret., filed May 31, 1996.]

Park later raised three contentions on Writ of Habeas Corpus in the California Supreme Court: 1) the prosecutor committed misconduct by failing to disclose that Nelson was a government informant; 2) the trial court abused its discretion in allowing jury to hear a secret tape recording; and 3) the prosecutor's delay in bringing charges against Park denied Park his due process right to speedy trial and right to effective assistance of counsel. The Court denied the petition, citing In re Dixon, 41 Cal.2d 756, 759, 264, P.2d 513 (1953). [Ret., Exh. D.]

DISCUSSION

Here, Park raises five contentions:

1. The trial court erred when it consolidated Counts 1-4 (Case No. BA059736) and 5-7 the two cases against Park, and BA067141. [Petition For Writ Of Habeas Corpus By A Person In State Custody, filed Apr. 22, 1996 ("Pet."), pp. 5 & foll. at 1-17.]

2. The prosecutor committed misconduct by failing to disclose before the jury that prosecution witness Michael Nelson was a government informant. [Pet., pp. 5 & foll at 8-13.]

3. The trial court abused its discretion by permitting the jury to hear a secret jailhouse tape Nelson made. [Pet., pp. 6 & foll. at 14.]

4. The trial court denied Park his right to a speedy trial. [Pet., pp. 6 & foll. at 15-17.]

5. Park's trial counsel was ineffective. [Ret. p. 4, citing Pet., pp. 19, 21-23.]

The state argues that Park has procedurally defaulted on claims two through five [Ret., pp. 5-10], and that claim one "is not a cognizable federal habeas claim." [Ret., pp. 11-12.]

A. Contention One

Park says the trial court "erred" when it consolidated the two cases against him, Case Nos. BA059736 and BA067141, thereby joining the charges under Counts 1 through 4 with Counts 5 through 7. [Pet., p. 5.][3]

In Featherstone v. Estelle, 948 F.2d 1497 (9th Cir. 1991), the Ninth Circuit articulated the "test [the court] appl[ies] in evaluating petitioner's claim of Constitutionally impermissible joinder:"

> "'[t]he propriety of consolidation rests within the sound discretion of the state trial judge. The simultaneous trial of more then one offense must actually render petitioner's state trial fundamentally unfair and hence, violative of due process before relief pursuant to 28 U.S.C. § 2254 would be appropriate.'"

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3. As to the first claim, the State concedes that Park has exhausted his state court remedies and does not contend that he has procedurally defaulted. [Ret., p. 3.] Therefore, the Court proceeds to the merits. Francis v. Rison, 894 F.2d 353, 355 (9th Cir. 1990) (failure to raise procedural default in district court is a waiver); Karis v. Vasquez, 828 F.Supp. 1449, 1463n.21 (E.D. Cal. 1993) (state bears burden of proof on procedural default defense); see also 28 U.S.C. § 2254(b)(3) (as amended by Terrorism Prevention Act, Pub.L. No. 104-132 § 104, 1110 Stat. 1214 (1996)).

948 F.2d at 1503, quoting Tribitt v. Wainwright, 540 F.2d 840, 841 (5th Cir. 1976), cert. denied, 430 F.2d 910, 97 S.Ct. 1184 (1977).[4]

Furthermore, in considering whether a violation of due process has occurred, the emphasis must be on the word "actually"; for viewed clearly, it is only the consequences of joinder, over which the trial judge has much control, and not the joinder itself, which may render the trial "fundamentally unfair." See United States ex. rel. Evans v. Follette, 364 F.2d 305, 306 (2d Cir. 1996) (per curiam), cert. denied, 385 U.S. 1016, 87 S.Ct. 733 (1967) (decision to consolidate charges for trial does not itself raise an issue of constitutional dimension).[5] Therefore,

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4. See also United States v. Lane, 474 U.S. 438, 446, n.8, 106 S.Ct. 725, 730 n.8, reh. denied, 475 U.S. 1104, 106 S.Ct. 1507 (1986) ("Improper joinder does not, in itself, violate the Constitution"; "[r]ather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"); Herring v. Meachum, 11 F.3d 374, 377-78 (2nd Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 1629 (1994) ("Joinder of offenses rises to the level of a constitutional violation only if it actually render[s] petitioner's state trial fundamentally unfair and hence, violative of due process'") (citation omitted); Leach v. Kolb, 911 F.2d 1249, 1258 (7th Cir.), cert. denied sub nom. Leach v. McCaughtry, 498 U.S. 972, 111 S.Ct. 441 (1990) ("the standard for the district court under § 2254 is that an improper joinder constitutes a federal constitutional violation only if the prejudice was so great as to deny a fair trial").

Park contends the joinder violates California Penal Code Section 954. [Pet., foll. p. 5, at 1-3.] Since it does not involve assertion of a federal right, this argument is not cognizable in this court.

5. "There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." United States v. Lotsch, 102

when a petitioner is claiming a due process violation based upon joinder of offenses, he must, to succeed, go beyond the potential for prejudice and prove that actual prejudice resulted from the events as they unfolded during the joint trial. Tribitt, 540 F.2d at 841 (joinder must "actually" render trial fundamentally unfair before habeas relief is appropriate).

Park argues that the consolidation in this case "prejudiced" him (Pet., foll. p. 5 at 3] because (1) the evidence in each case would not be cross-admissible from one to the other if the court tried them separately [Pet., foll. p. 5, at 5-6], (2) the charges were "likely to inflame the jury," and (3) the case involved the "improper

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F.2d 35, 36 (2d Cir.) (L. Hand, J.) cert. denied, 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed. 1500 (1939). "'[J]uries are apt to regard with a more jaundiced eye a person charged with two crimes that a person charged with one.'" United States v. Werner, 620 F.2d 922, 929 (2d Cri. 1980)) quoting United States v. Smith, 112 F.2d 83, 85 2d Cir. 1940)); see also Corbett v. Bordenkircher, 615 F.2d 722, 724-25 (6th Cir.), cert. denied, 449 U.S. 853, 101 S.Ct. 146 (1980) (describing forms of prejudice that may result from joint trial.)

Nonetheless, the Supreme Court, a generation ago, explicitly accepted that "[t]his type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting the evidence to its proper function, and (2) the convenience of trying different crimes against the same person . . . in the same trial is a valid governmental interest." Spencer v. Texas, 385 U.S. 554, 562, 87 S. Ct. 648, 653, reh. denied, 386 U.S. 969, 87 S. CT. 1015 (1967). Thus, joinder of offenses has long been recognized as a constitutionally acceptable accommodation of the defendant's right to a fair trial. As discussed in the context of joinder of defendants, consolidated prosecutions "conserve state funds, diminish inconvenience to witnesses and public authorities and avoid delays in bringing those accused of crime to trial." Burton v. United States, 391 U.S. 123, 134, 88 S.Ct. 1620, 1627 (1968); see also Zafiro v. United States, 506 534, 537, 113 S.Ct. 933, 937 (1993).

'spillover' effect of aggregate evidence" from one set of charges to the other. [Pet., foll. p. 5 at 6-7.]

Cross-admission of the evidence as to counts 1 through 7 in separate trials would not have violated due process. The evidence as to the "Munho Kim" crimes (Counts 1 through 4) essentially consisted of Nelson's testimony and its admission in a trial concerning the "Keum Kim" crimes (counts 5 through 7) would not have violated due process. Nelson was Park's friend and confident from December of 1990 until May 11, 1992. Between March of 1991 until at least August 20, 1991, Nelson worked at Park's nightclub seven days a week and dined with Park almost nightly, and Park discussed his criminal schemes and ambitions with Nelson. Sometime, prior to May 11, 1992, less than four weeks before the "Keum Kim" crimes occurred, Park told Nelson he was going to "blow up" Soo's house (Keum's house) and a business Soo's family owned and operated. Prior to May 11, 1992, Park frequently told Nelson he had access to explosives whenever he desired. (R.T. 537-540, 543-546, 548-552, 1028-1029, 1032-1036.] Nelson's testimony could have established appellant's opportunity, intent, knowledge, absence of mistake or accident as to the "Keum Kim" crimes in a separate trial on counts 5 through 7. See, e.g. Cal. Evid. Code § 1101(b) ("[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . opportunity, intent. . . . knowledge, identity, absence of mistake or accident . . . .) other than his or her disposition to commit such an act").

This is not a case where certain of the charges were unusually likely to have actually inflamed the jury against Park. The jury did not find Park guilty of charges 6 and 7. Therefore, it can be inferred that the jury was not

tainted by the consolidation of the counts, since had it been inflamed, the jury presumably would have found Kim guilty of all counts.

Third, the record shows Park's conviction on the "Munho Kim" crimes (Counts 1 through 4) rested almost exclusively on the jury finding Nelson's testimony credible. Likewise, Park's conviction on the terrorist threats count (Count 5) rested almost exclusively on the jury finding Keum's testimony credible. Hence, this is not a case where a weak case has joined with a strong case (or another weak case) so that the spillover effect of aggregate evidence charges altered the outcome of some or all of the charges. As noted earlier, the jury found Park not guilty of Counts 6 and 7.

Indeed, that the jury found Park not guilty on counts 6 and 7 affirmatively demonstrates appellant suffered no actual prejudice by the consolidation of Counts 1 through 7 and that his claim of improper consolidation therefore fails.

B. Claims Two Through Five

The California Supreme Court's citation of In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953) makes it clear the Court relied on procedural bar to deny review of the claims Park asserted in his state habeas petition. "The independent and adequate state ground doctrine prevents the federal courts from addressing the habeas corpus claims of state petitioners when a state-law default prevented the state courts from reaching the merits of the federal claims." Thomas v. Lewis, 945 F.2d 1119, 1122 (9th Cir. 1991). Park has therefore procedurally defaulted on claims two through five of his present petition.

This court may address the merits of Park's procedurally defaulted claims if Park can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law. Bonin v. Calderon, 77 F.3d 1155, 1158 (9th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 980 (1996). To demonstrate cause, Park must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Lacking cause and prejudice, the court may nonetheless consider procedurally barred claims if failure to consider then would result in the conviction of "'one who is actually innocent.'" Schlup v. Delo, ___ U.S. ___, _, 115 S.Ct. 851, 864 (1995).

Park claims he can show cause because the procedural default was "due to . . . Appellate Counsel rendering petitioner ineffective assistance of counsel." [Notice of Traverse To The Attorney General[']s Return And Memorandum Of Points And Authorities In Support Thereof, filed Jun. 10, 1996 ("Tr."), p. 1.] He also asserts that prejudice resulted from his appellate attorney's failure to raise contentions two through five and that this failure resulted Park's conviction for crimes of which he is actually innocent. [Tr., pp. 2-4.] "Ineffective assistance of counsel may constitute case, if the representation amounts to an independent Sixth Amendment violation." Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir. 1996); see also Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993).

However, Park's mere statement that his attorney should have raised the issues does not suffice, and a claim of ineffective assistance of counsel must first be separately exhausted in state court before it can serve as cause for the procedural default of another claim. Murray v. Carrier, 477 U.S. 478, 488-89, 106 S.Ct. 2639, 2645-46

(1986). Since Park has not fairly presented this claim to the California Supreme Court, "we may not now entertain the claim as 'cause' for default." Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988); Hughes v. Idaho State Board Of Corrections, 800 F.2d 905, 906 (9th Cir. 1986).[6]

Alternatively, Park argues that failure to reach the merits of his claims would result in a fundamental miscarriage of justice. [Tr., p. 3.] There is no serious question of Park's guilt, nor does he even press this issue diligently. See Bonin v. Calderon, 59 F.3d 815, 836 (9th Cir. 1995), cert. denied, ___ U.S.___, 116 S.Ct. 718, reh. denied, ____ U.S. ____, 116 S.Ct. 977 (1996) (applying prejudice standard for cases in which there is "'overwhelming evidence of guilt,'" quoting United States v. Coleman, 707 F.2d 374, 378 (9th Cir.), cert. denied, 464 U.S. 854, 104 S.Ct. 171 (1983)). No fundamental miscarriage of justice would occur from denying Park's petition as procedurally barred.

CONCLUSION

Accordingly, IT IS THERE RECOMMENDED that the Court DENY Park's petition for writ of habeas corpus with prejudice.

DATED: This _____ day of July, 1996

Joseph Reichmann
United States Magistrate Judge

---

6. Park also argues that the long delay in the prosecution filing charges against him is also cause. [Tr., p. 4.] However, Park has not shown how the delay in his trial in any way prevented him from raising his claims on direct appeal. Hence, it cannot constitute cause for that failure.

FILED
SEPTEMBER 20, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK,	)	No. CV 962841-JMI(JR)
	)	
Petitioner,	)	FINAL REPORT
	)	AND
	)	RECOMMENDATION
v.	)	
	)	
DON R. HILL, WARDEN, et al.,	)	
	)	
Respondent.	)	

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable James M. Ideman, United States District Judge pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On July 15, 1996 the Clerk filed a Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate Judge's Report and Recommendation.

No objections were filed.

IT IS THEREFORE RECOMMENDED that this Court issue an Order approving and adopting the Report and Recommendation and dismissing the petition.

DATED: August 8, 1996.

/S/
JOSEPH REICHMANN
United States Magistrate Judge

LODGED
JULY 15, 1996

FILED
SEPTEMBER 20, 1996

ENTERED
SEPTEMBER 23, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK,	)	No. CV 96-2841 JMI(JR)
	)	
Petitioner,	)	JUDGMENT
	)	
v.	)	
	)	
DON R. HILL, WARDEN, and ATTORNEY GENERAL et al.	)	
	)	
Respondents.	)	

IT IS ADJUDGED that the petition of Don Soon Park for writ of habeas corpus is dismissed with prejudice.

DATED: 19 Sep. 96

/S/
Hon. James M. Ideman
United States District Judge

FILED
SEP 20 1996

ENTERED
SEP 23 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DON SOON PARK,	)	No. CV 96-2841-JMI(JR)
	)	
Petitioner,	)	ORDER
	)	ADOPTING THE
v.	)	MAGISTRATE JUDGE'S
	)	FINDINGS,
DON R. HILL,	)	CONCLUSIONS AND
Warden,	)	RECOMMENDATIONS
et al.	)	
	)	
Respondent.	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(B), the Court has reviewed the pleadings and all papers herein, the Report and Recommendation, and adopts the findings, conclusions and recommendations of the United States Magistrate Judge.

IT IS ORDERED that Judgment be entered dismissing the petition.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order by United States mail on the petitioner and respondent.

DATED: 19 Sep 96

/S/
JAMES M. IDEMAN
United States District Judge

FILED
NOV 22 1996

ENTERED NOV 26 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DON SOON PARK,	)	No. CV 96-2841-JMI(AN)
	)	
Petitioner,	)	ORDER
	)	DENYING MOTION
v.	)	FOR CERTIFICATE OF
	)	PROBABLE CAUSE
DON R. HILL,	)	
WARDEN,	)	
et al.	)	
	)	
Respondents.	)	

On September 23, 1996, judgment was entered dismissing petitioner's petition for writ of habeas corpus with prejudice. Petitioner filed a Notice of Appeal on October 1, 1996, along with a document entitled "Notice of Motion and Motion for Certificate of Probable Cause" ("Motion").

On April 24, 1996, the President signed into law the "Antiterrorism and Effective Death Penalty Act," ("the Act"). The Act, in part, amends 28 U.S.C. §2253, the provision governing the appealability of a district court's decision on habeas petitions filed by a state prisoner. Pub.L.No. 104-132. While petitioner's habeas petition was filed before the enactment of the Act, judgment was

entered, and his Notice of Appeal and Motion were filed, after the Act had been signed into law.

The Court concludes the amended section 2253(c) applies to petitioner's case. See Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996) (holding that amended section 2253(c) applied to an application for a certificate of probable cause filed after the effective date of the Act, even through the habeas petition had been denied before the Act, because the provision amounted to a procedural change that posed no issue of retroactivity); Lennox v. Evans, 87 F.3d 431, 434 (10th Cir. 1996) (holding amended section 253(c) applied to an application for a certificate of probable cause filed before the effective date of the Act); United States v. Cota-Loaiza, ___ F.Supp. _ 1996 WL 465209, at *2 (D.Colo. 1996) (holding amended section 2253(c) applied to an application for a certificate of probable cause filed after the effective date of the Act); Parker v. Norris, 929 F.Supp. 1190, 1191 n.1 (E.D.Ark. 1996) (same); Houchin v. Zavaras, 924 F. Supp. 115, 116-117 (D.Colo. 1996) (same); cf. Lowell v. Prunty, 91 F.3d 1358, 1359 (9th Cir. 1996) (declining to decide whether amended section 2253(c) applied to cases pending before the effective date of the Act); Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996) (same).

Under section 2253(c), as amended, a request for a certificate of probable cause is now called a certificate of appealability and will only be granted if the petitioner has made a "substantial showing of the denial of a constitutional right." 29 U.S.C. §2253(c)(2). The Ninth Circuit has recently held "the standard of obtaining a certificate of appealability under the Act is more demanding than the standard for obtaining a certificate of probable cause under the law as it existed prior to enactment of the Act." Williams v. Calderon, 83 F.3d at

286. But See Reyes v. Keane, 90 F.3d at 680 (standards under both terms are the same).

In any event, the Court has reviewed the petitioner's Notice of Appeal, his Motion (which is construed as a request for a certificate of appealability instead of request for a certificate of probable cause), and the final Report and Recommendation of the United States Magistrate Judge previously adopted by the Court and filed on September 23, 1996. Based on the foregoing, the Court finds the petitioner has failed to make the requisite showing required for the issuance of a certificate of probable cause, let alone a certificate of appealability. Accordingly, petitioner's Motion is denied.[1] **It is so ordered.**

---

1. The amended statute provides that an appeal may not be taken to the court of appeals from a district judge's ruling on a state prisoner's habeas corpus petition unless a "circuit justice or judge" issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). Read alone, section 2253(c) appears to eliminate this Court's authority to rule on petitioner's motion. The Act, however, also amends Rule 22 of the Federal Rules of Appellate Procedure. In relevant part, amended Rule 22 provides that "an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c)."

While it is not entirely free from doubt, the weight of the authority indicates that this Court retains the authority to issue certificates of appealability under the Act. See Haykins v. Roberts, __ F.Supp. ___ 1996 WL 478799, at *1 (S.D. Miss. 1996); United States v. Cota-Loaiza, 1996 WL 465209, at *4; Houchin v. Zavaras, 924 F.Supp. 115, 117 (D.Colo. 1996); but see Parker v. Norris, 929 F. Supp. At 1192-93 (concluding that a district court lacks authority to issue a certificate of appealability under the Act). The Court need not reconcile 2253(c) with Rule 22 because, whether the Court has authority to issue the certificate or not, the outcome in petitioner's case is the same -- that is, the denial of his appealability after concluding district court lacked authority to rule on motion). Petitioner may seek a certificate of appealability by filing a request for such certificate in the United States Court of Appeals for the

DATED: November 20, 1996

/S/
JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

Ninth Circuit in accordance with 28 U.S.C. §2253.

FILED
MAR 14 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON SOON PARK,	) No. 96-56750
	)
Petitioner/Appellant,	) DC# CV-96-2841
	) -JMI
	) Central California
vs.	)
	) ORDER
PEOPLE OF THE STATE OF CALIFORNIA, et al.,	)
	)
	)
Respondents/Appellees.	)

Before: LEAVY and THOMAS, Circuit Judges

Appellant is granted a certificate of probable cause. Appellant's request for a certificate of appealability is denied as unnecessary because appellant's petition was filed in the district court prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996. See Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996) (en banc) (order).

Appellant is granted leave to proceed in forma pauperis.

Appellant's opening brief is due April 25, 1997; appellee's brief is due May 27, 1997; the optional reply brief is due within 14 days after service of appellee's brief.

Because appellant is a prisoner proceeding in forma pauperis and is not represented by counsel appellant is not required to file excerpts of record. 9th Cir. R. 24-1.

Because there were no hearings in the district court, the clerk of that court shall forward the Certificate of Record immediately. 9th Cir. R. 11-2.

The Clerk shall retain the district court case file as the record on appeal pending resolution of this appeal.

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APPENDIX D

Second Appellate District, Division Five, No. B085053
S049533

SUPREME COURT
FILED
NOV 29 1995
ROBERT WANDRUFF CLERK
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

==========

THE PEOPLE, Respondent
v.

DON SOON PARK, Appellant

==========

Appellant's petition for review DENIED.

LUCAS
Chief Justice

ORDER DENYING WRIT OF HABEAS CORPUS

No. S051570

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
MAR 27 1996
ROBERT WANDRUFF CLERK
INITIAL
DEPUTY

==========

IN RE DON SOON PARK

ON

HABEAS CORPUS

==========

Petition for writ of habeas corpus DENIED. (See In re Dixon (1953) 41 Cal.2d 756, 759.)

APPENDIX E

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DON SOON PARK, Defendant and Appellant.	B085053 (Super. Ct. No. BA059736 c/w No. BA067141 COURT OF APPEAL-SECOND DIST. FILED SEP 20 1995 JOSEPH A. LANE CLERK

Appeal from a judgment of the Superior Court of Los Angeles County. James A. Bascue, Judge. Affirmed.

Kevin C. McLean, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol

Wendelin Pollack, Senior Assistant Attorney General, John R. Gorey, Supervising Deputy Attorney General, and Carl N. Henry, Deputy Attorney General for Plaintiff and Respondent.

INTRODUCTION

Defendant, Don Soon Park, appeals from the judgment entered in consolidated case Nos. BA067141 and BA059736 following a jury trial which resulted in his convictions: for conspiracy to commit robbery (Pen. Code[1], §§ 182, subd.(a)(1), 211 (count 1)); conspiracy to commit burglary (§§ 182, subd.(a)(1), 459 (count 2)); first degree residential burglary (§ 459 (count 3)); attempted first degree residential burglary (§§ 211, 664 (count 4)); and terrorists threats. (§ 422 (count 5).) Further, the jury found to be true the special allegations he was a principal who was armed with a firearm in count 1 through 4. (§12022, subd.(a)(1).) Defendant contends the court prejudicially erred in consolidating, over his objection case Nos. BA067171 which charged counts 1 through 4 arising from a residential robbery and burglary and BA059736 which contained charges in counts 5 through 7 arising from: various threats against the person; threats directed at property; and a later store bombing. (§ 451, subd. (c).) We affirm.

FACTS

Viewed in accordance with the usual rules on appeal (*Jackson* v. *Virginia* (1979) 443 U.S. 307, 319; *Taylor* v. *Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909; *People* v. *Bean* (1988) 46 Cal.3d 919, 932), the evidence concerning the residential burglary and robbery established that in

---

1. Unless otherwise indicated, all future statutory references are to the Penal Code.

March and April 1991, defendant hired Mr. Nelson and Mr. Sander as security guards in one of his nightclubs. Munho Kim owed defendant money. Defendant told Mr. Nelson, the security guard, about a plan to: follow Mr. Kim home one night; restrain him with duct tape; threaten him with a gun; and rob him of the owed money. Defendant recruited Mr. Nelson and Mr. Sander to participate in a conspiracy to commit the robbery. Between May and August 1991, defendant, Mr. Nelson and Mr. Sander engaged in two aborted attempts to carry out their plans. On August 20, 1991, defendant, Mr. Nelson, and Mr. Sander arrived, as planned, near Mr. Kim's house at about midnight. Mr. Kim arrived at his home. Mr. Sander and Mr. Nelson followed Mr. Kim into the garage. Mr. Sander began hitting Mr. Kim. Mr. Kim's wife entered the garage and screamed. Mr. Sander and Mr. Nelson left. Defendant, who drove separately, escaped. The police stopped and arrested Mr. Nelson and Mr. Sander.

The evidence concerning the threats and bombing established defendant had known Mr. and Mrs. Soo Young Hong, their children, and Mr. Soo's mother for some time. Mr. Soo owed defendant money. Defendant was dating Mrs. Soo during her separation from Mr. Soo. Sometime prior to May 11, 1992, Mrs. Soo and defendant asked Mr. Nelson to kill Mr. Sool. Mr. Nelson refused. Defendant then told Mr. Nelson he was going to "blow up": Mr. Soo's house; Mr. Soo's mother's house; and Mr. Soo's store. Sometime before the store was bombed, Mr. Soo's mother and defendant had a disagreement over a remark. Defendant blamed Mr. Soo's mother for the remark and repeatedly demanded monetary compensation from her. A few days before the store bombing, defendant telephoned Mr. Soo's mother and told her if she did not pay he would: not leave her family alone; bomb her store; and kill her and her family. Mr. Soo's

mother took defendant's threats seriously and notified the police. On June 8, 1992, the store was blown up with galvanized pipe bomb. In defense, defendant presented character witnesses, including Mr. Soo's wife, who said he was not capable of committing any of the crimes.

On March 26, 1993, a four count information in case No. BA067141 was filed concerning the incident at Mr. Kim's house, charging defendant with: conspiracy to commit robbery (§§ 182, subd.(a)(1), 211); conspiracy to commit burglary (§§ 182, subd. (a)(1), 459); first degree residential burglary (§ 459); and attempted first degree residential burglary. (§§ 211, 664).) On July 28, 1993, an amended information in case No. BA059736 was filed concerning the: threats and store bombing charging defendant with making terrorist threats (§ 422); use of a destructive device and explosive to injure or destroy property (§ 12303.3); and arson of a structure. (§ 451, subd.(c).)

On April 8, 1993, the prosecutor filed a motion to consolidate case Nos. BA067141 and BA059736 because both cases charged assaultive behavior, the evidence was cross-admissible, and the consolidation would result in the efficient use of court time. Following a hearing, the court ordered the two cases consolidated. The court found: "the issues in case No. BA067141 [counts 5-7] are similar to the issues and charges in this action [counts 1-4 in case No. BA059736]. The Court hereby consolidates said cases over the defense objection. . . ."

DISCUSSION

Defendant's contention the court abused its discretion and caused prejudice by consolidating the cases is meritless. We apply the deferential abuse of discretion standard of review. (*People* v. *Mason* (1991) 52 Cal.3d

909, 933; *People* v. *Ruiz* (1988) 44 Cal.3d 589, 605.) Both informations charged assaultive crimes against person; e.g., conspiracy to commit robbery and terrorists threats.[2] (*People* v. *Melton* (1988) 44 Cal.3d 713, 767; *People* v. *Allen* (1995) 33 Cal.App.4th 1149, 1155-1156; *People* v. *Armstrong* (1992) 8 Cal.App.4th 1060, 1068-1069.) Since crimes involving assaultive behavior are of the same class, the cases here charging assaultive crimes were properly consolidated. (*People* v. *Rhoden* (1972) 6 Cal.3d 519, 524-

---

2. Section 182, subdivision (a) states, in pertinent part: "If two or more persons conspire: [¶] (1) to commit any crime."

Section 211 states: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Section 422 states: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison. [¶] For the purposes of this section, 'immediate family' mean any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household."

525; *People* v. *Armstrong, supra,* 8 Cal.App.4th at pp. 1068-1069.) Additionally, even assuming the informations were improperly consolidated, defendant has failed to demonstrate prejudice. Neither case was more inflammatory than the others. The relative strength of each case did not significantly differ. Finally, each case for the most part rested on the credibility of independent witnesses, Mr. Nelson for the burglary and residential robbery and Mr. Soo's mother for the terrorists threats. (*People* v. *Shorts* (1963) 221 Cal.App.2d 732, 734-735.) Thus, the court did not abuse its discretion in consolidating the cases.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

GODOY PEREZ, J.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 09 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DON SOON PARK, Petitioner-Appellant, v. THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 96-56750 D.C. No. CV-96-02841-JMI(JR) ORDER

Before: HUG, Chief Judge, B. FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Hug and Trott have voted to deny the petition for rehearing en banc, and Judges B. Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R.App.P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

Supreme Court, U.S.
FILED
AUG - 7 2000
CLERK

(2)

No. 99-1971

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

DON SOON PARK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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36pp

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that a state court's unelaborated citation of the state-law *In re Dixon*, 264 P.2d 513 (1953) rule as the sole justification for its denial of a pre-*In re Robbins*, 959 P.2d 311 (Cal. 1998) habeas petition did not constitute an adequate and independent state law ground of decision sufficient to bar federal habeas review.

2. Whether the court of appeals' holding is consistent with the exhaustion and procedural default doctrines as articulated in this Court's decisions, including *Coleman v. Thompson*, 501 U.S. 722 (1991), *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) and *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000).

3. Whether the court of appeals' holding respected federalism and comity interests because the court correctly applied the adequate and independent state law ground doctrine and did not impinge on the State's ability to define its procedural bar rules as it sees fit.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 31a-54a), filed on January 21, 2000, is reported at 202 F.3d 1146. The first opinion of the court of appeals (Pet. App. 55a-73a), filed on January 14, 1999 and withdrawn on January 21, 2000, is reported at 164 F.3d 1226. The district court's opinion (Pet. App. 74a-96a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals issued its amended opinion on January 21, 2000, and denied the petition for rehearing and suggestion for rehearing en banc on March 9, 2000. *See* Pet. App. 105a-106a. The petition for a writ of certiorari was filed on June 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time that respondent's federal habeas petition was filed, Section 2254 of Title 28 of the United States Code provided in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody — pursuant to the judgment of a State court shall not be granted unless it appears that
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or

> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (1996).

Petitioners ask this Court to grant certiorari to review whether the court of appeals in the present case properly interpreted a question of state procedural law in finding that the state's fundamental constitutional error exception to its procedural bar rule failed to constitute an adequate and independent state law ground of decision barring federal habeas review. Nothing in this case warrants review by this Court. *First*, the case presents a number of vehicle problems: the court of appeals' decision is interlocutory because the issue it addresses may be rendered moot after further proceedings; there are at least two possible alternative grounds for affirming the judgment; the decision concerns a narrow question of state law that is of little continuing importance because the rule at issue has no prospective application; and any consideration by this Court would be premature in light of the fact that two of the major Supreme Court decisions on which petitioners rely — *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000) and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) — were issued in the past two years, leaving insufficient time for any potential conflict in their interpretation among the courts of appeals to become developed. *Second*, petitioners have not plausibly alleged any conflict between the court of appeals' holding and any decision of this Court, any other federal court of appeals, or the state supreme court. *Third*, the decision does not raise federalism concerns because the court of appeals has in no way prevented the state

court from interpreting its procedural bar rules as it sees fit. Petitioners' argument amounts to a request that this Court engage in mere error correction in a case where the court of appeals correctly applied existing state procedural law.

In any event, the court of appeals' holding is correct. The court faithfully adhered to the state supreme court's recent decision in *In re Robbins*, 959 P.2d 311 (1998), which both (1) *prospectively* reinterpreted the fundamental error exception to the *Dixon* procedural default as turning entirely on questions of state law, and (2) acknowledged that prior interpretation of that bar under *In Re Harris*, 855 P.2d 391 (1993), was not independent of federal law. Because Park raised federal constitutional claims in his state habeas petition, the court of appeals did not err in holding that the state court's pre-*Robbins* denial of Park's petition by way of an unelaborated citation to the state supreme court's decision in *In re Dixon* was not an independent state law ground of decision.

STATEMENT OF THE CASE

Respondent Don Soon Park was convicted in state court of five state law felony offenses arising out of two separate incidents. After an unsuccessful attempt to overturn his convictions on direct appeal, Park filed a petition for a writ of habeas corpus to the California Supreme Court, in which he alleged four new claims. The state supreme court summarily denied Park's petition, stating in full: "Petition for writ of habeas corpus DENIED. (*See In re Dixon* (1953) 41 Cal. 2d 756, 759)" *See* Pet. App. 97a-98a.[1] On federal habeas review, Park renewed his claims and added a claim based on improper consolidation. The district court dismissed the petition with prejudice. The court of appeals affirmed the district court's dismissal of three

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1. In *In re Dixon*, the state supreme court first established its general rule that habeas will not be granted "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *Id.* at 514-15.

of Park's claims, but reversed the district court's order dismissing two of Park's constitutional claims on grounds of procedural default. Slightly more than one year later, the court of appeals issued an amended opinion, in which it modified its reasoning but reached the same result.

1. Park was charged in conjunction with two different crimes: a home invasion that occurred in August 1991 and a liquor store bombing that occurred in June 1992. On June 27, 1993, the trial court granted the prosecution's motion to consolidate the two cases. The twelve-day consolidated trial began on February 28, 1994. The evidence on both the home invasion counts and the bombing counts consisted largely of testimony from a witness who had been a government informant, but many of the details of his informant status were never revealed to the defense. The trial court rejected respondent's efforts to seek additional information. On March 14, 1994, the jury convicted Park of conspiracy to commit robbery, conspiracy to commit burglary, first-degree residential burglary, and attempted first-degree residential robbery in conjunction with the home invasion incident, and with making terrorist threats in conjunction with the bombing incident. The state trial court sentenced Park to seven years and eight months in prison, and Park has since served his entire sentence. Pet. App. 39a.

2. On direct appeal, Park asked his appointed appellate counsel to raise all the claims later raised in his state and federal habeas petitions, but his counsel raised only the improper consolidation claim. On September 20, 1995, the state Court of Appeal affirmed the judgment of conviction. On November 29, 1995, the California Supreme Court denied Park's petition for review without citation to authority.

3. On February 2, 1996, Park filed a pro se petition for writ of habeas corpus in the California Supreme Court, raising the four claims that appellate counsel failed to raise on direct appeal: (1) prosecutorial misconduct in failing to disclose a witness's informant status; (2) abuse of the trial court's discretion in admitting a tape of Park's jailhouse conversations; (3) denial

of the right to a speedy trial due to the prosecution's delay in bringing the charges; and (4) denial of the right to effective assistance of counsel. On March 27, 1996, the court summarily denied the petition with an unelaborated citation to *In re Dixon*, 264 P.2d 513 (1953). *See* Pet. App. 97a-98a.

4. On April 22, 1996, Park filed a pro se federal habeas petition in district court, raising the same claims, and adding a claim for improper consolidation. A magistrate judge issued a report and recommendation denying the petition because of procedural default.[2] On September 23, 1996, the district court adopted the report and dismissed Park's federal habeas petition with prejudice. Pet. App. 88a-90a.

5. On appeal, Park argued that the district court erred by failing to conduct a complete procedural bar analysis and by declining to consider the merits of Park's habeas corpus petition. In an amended opinion authored by Judge Trott and filed on January 21, 2000, the court of appeals affirmed the district court's decision in part, reversed in part, and remanded. The court rejected Park's improper consolidation claim, but agreed with Park that the district court erred when it held that his constitutional claims were procedurally defaulted. The court remanded the questions of whether Park's speedy trial and prosecutorial misconduct claims amounted to constitutional violations to the district court.[3]

In addressing the procedural default issue, the court initially outlined the dual doctrines of exhaustion and procedural default. First, pursuant to this Court's interpretation of 28 U.S.C. § 2254 in *O'Sullivan*, "[b]efore a federal court may grant habeas relief

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2. Park's additional improper consolidation claim was denied on the merits.

3. The court affirmed on other grounds the district court's denial of Park's ineffective assistance of counsel claim, finding that this claim was not properly raised in his federal habeas petition. The court also affirmed on other grounds Park's claim alleging improper admission of jailhouse tapes.

to a state prisoner, the prisoner must [properly] exhaust his remedies in state court." Pet. App. 45a. Second, for a state's procedural default rule to bar federal habeas review, it "must provide 'an adequate and independent state law basis' on which the state court can deny relief." Pet. App. 45a (quoting *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991)). The court also noted the *Michigan v. Long*, 463 U.S. 1032 (1983) presumption that, "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Pet. App. 45a-46a.

Applying those principles, the court of appeals first reviewed the state law *Dixon* rule, which holds that a state habeas petitioner "must, if possible, have pursued his claims on direct appeal." Pet. App. 46a. Because Park failed to do so, the court found that he would normally be barred from bringing his federal petition, but only if the *Dixon* rule was an adequate and independent state law basis. Pet. App. 46a-47a. In the years after *Dixon*, confusion arose in the state courts over the proper interpretation of state procedural bar exceptions. In 1993, the state supreme court decided two cases, *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993), that were intended to clarify those exceptions. Under *Clark* and *Harris*, a court "would hear the merits of a claim in a state habeas petition, despite the petitioner's failure to bring the claim on direct appeal from the conviction, if the court found one of four exceptions," including the exception relevant in Park's case, "fundamental constitutional error." Pet. App. 47a.

The court of appeals next considered whether *Dixon*'s fundamental constitutional error exception — as applied after *Clark* and *Harris* but prior to the state supreme court's

1998 decision in *In re Robbins*[4] — was an "independent" state ground of decision, and concluded that it was not. Pet. App. 48a-49a. The court emphasized that, "No question can exist that *In re Harris* defined fundamental constitutional error by reference to federal law" because the *Harris* court (1) stated that fundamental error involves " 'the individual's right . . . to a fair trial under both the state and federal Constitutions,' " and (2) cited this Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991), in defining such error. Pet. App. 49a.

The court observed that *In re Robbins*, 959 P.2d 311, 338 (Cal. 1998), adopted a new approach to fundamental constitutional error "from which it will now decline to consider federal law when deciding whether claims are procedurally defaulted," but that the new rule was to be applied prospectively only. Pet. App. 49a-50a. Because *Robbins* was decided after the *Dixon* rule was applied in Park's case, its prospective pronouncement was inapplicable. The court concluded that, "in light of *Robbins*'s acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court [in pre-*Robbins* cases] necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's habeas petition." Pet. App. 50a.[5]

Turning to *O'Sullivan* and Section 2254, the court of appeals found that Park should have raised his federal claims before the state supreme court on direct appeal. "His failure to

4. *In re Robbins*, 959 P.2d 311 (1998), was decided by the California Supreme Court while Park's appeal was pending in the Ninth Circuit. As explained, *infra*, the *Robbins* court issued a prospective holding that significantly altered the state courts' prior interpretation of the *Dixon* rule and its exceptions.

5. The court of appeals summarily denied the attorney general's motion to certify questions of state law to the state supreme court. *In re Park*, 202 F.3d 1146, 1148 n.1 (9th Cir. 2000) Pet. App. 39a n.5.

do so temporarily rendered those claims both unexhausted and potentially unexhaustible — or procedurally defaulted — because the time for leave to appeal 'has long passed.' " Pet. App. 50a-51a (citing *O'Sullivan*, 526 U.S. at 846). However, the court found that, by pursuing his claims on state habeas, Park had in effect revived them: "it can be fairly said under § 2254(c) that California, through its recognized exception to the *Dixon* rule, gave him the right 'to raise, by any available procedure, the question presented.' " Pet. App. 51a. Under *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991), " '[i]f the last state court to be presented with a federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available,' " so the court found that Park's right to raise his claims before the state supreme court was sufficient to satisfy Section 2254(c) as interpreted by *O'Sullivan*, even if Park had no right to review of his claims. Pet. App. 51a. The court of appeals explained that "Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims." Pet. App. 51a. That the state supreme court "did examine Park's claims for fundamental constitutional error" was all that was "required to exhaust [his] claim and to avoid procedural default." Pet. App. 51a. The court acknowledged that its analysis might differ in post-*Robbins* cases, but that under pre-*Robbins* law, "Park surely gave the state court the 'first opportunity to review his claim and provide any necessary relief' " as required by *O'Sullivan*. Pet. App. 51a.

Because Park's prosecutorial misconduct and speedy trial claims alleged federal constitutional error, the court of appeals found that *Dixon* was not an independent bar. Accordingly, the court reversed the district court's holding of procedural default on those two claims. The court found it unnecessary to reach the issues of whether the pre-*Robbins* *Dixon* rule constituted an "adequate" state law ground of decision, *see* Pet. App. 46a n.6, and of whether Park had

shown "cause and prejudice" sufficient to excuse any procedural default, *see id.* at 54a.[6]

REASONS FOR DENYING THE WRIT

Petitioners contend that the court of appeals erred when it found that the state supreme court's summary denial of Park's habeas petition did not present an independent state law ground of decision barring federal habeas review. According to petitioners, the court's holding that the state *Dixon* rule did not bar federal habeas review of Park's federal constitutional claims created a conflict among the courts of appeals as to whether a state court's rejection of a fundamental error claim is an independent state law ground. Petitioners secondarily argue that the court of appeals misapplied *O'Sullivan* by finding that Park's assertion of his claims on state habeas review lifted the bar to federal court review, and violated comity by applying a more stringent standard to California's procedural rules than to a parallel federal procedural default rule. Petitioners do not allege an intercircuit conflict as to either of those issues. Petitioners' reading of the court of appeals' decision is incorrect, and — under any interpretation — that decision does not present a conflict warranting review by this Court.

1. Nothing in this case warrants review by this Court, and in any event this is an unsuitable vehicle for resolving any of the issues raised by petitioners.

a. *Vehicle problems.* For a number of reasons, this case is a poor vehicle for the resolution of any question raised by petitioners.

First, the case comes to this Court in an *interlocutory* posture. The Ninth Circuit did not grant Park's writ of habeas corpus; it merely held that Park did not procedurally default his claims for relief. On remand, the district court can decide whether those claims for relief have any merit. If they do not,

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6. Petitioners filed a second petition for rehearing and suggestion for rehearing en banc, which was denied on March 9, 2000. Pet. App. 105a-106a.

then that would effectively render the core issue in this case — proper application of the fundamental constitutional error exception — moot. If they do have merit, then the State can again petition for review, and the Court can review the merits of those claims, as well as the merits of the court of appeals' procedural default holding, at that time.

Second, there are at least two possible *alternative grounds for affirming* the Ninth Circuit's judgment: that the state law ground is not adequate, or that the procedural default is excused by "cause and prejudice." If the Court decides to review the case, it may conclude that, in fact, one or both of those reasons are valid, and be forced to affirm the court of appeals' decision on grounds other than the questions presented, again making this case a poor vehicle.

Third, this decision concerns a *narrow question of state law*. Petitioners' alarmist predictions about the impact of the *Park* decision are unsubstantiated. Petitioners vastly overstate the scope of the *Park* decision in asserting that the "holding is so broadly stated that it jeopardizes *all* California state procedural bars imposed in cases prior to August 3, 1998, including more than 500 unresolved capital cases." Pet. 8 (emphasis added). The Ninth Circuit's holding does not address "all California state procedural bars," but rather, concerns only California's application of the *Dixon* procedural bar. *See Park*, 202 F.3d at 1153. Moreover, the Ninth Circuit's holding only impacts the application of *Dixon* to claims alleging federal constitutional error, and has no effect on the application of *Dixon* to claims of state law error. *See id.* ("the California Supreme Court necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's state habeas petition.") (emphasis added).

Fourth, even the narrow question of state law at issue has *little continuing importance*. The state law procedural rule at issue has been reinterpreted by the state court since Park's state habeas petition was denied, and therefore the ruling at issue in

this case has no prospective application and will have very little impact outside the confines of the present case. *See id.* ("We do not decide here whether *Robbins* establishes the independence of California's *Dixon* rule for the future."). The issues raised by this case will not arise in post-*Robbins* cases (i.e., post-August 3, 1998).

Fifth, any consideration by this Court would be *premature* in light of the fact that two of the major Supreme Court decisions on which petitioners rely — *Edwards* and *O'Sullivan* — were issued in the past two years. Lower courts have not yet had an adequate opportunity to apply those decisions, and therefore any disagreements about their application have not become developed.

b. *No intercircuit conflict.* Petitioners have not plausibly alleged any conflict between the court of appeals' holding and any decision of this Court, any other federal court of appeals, or any state supreme court. The only aspect of the decision that petitioners claim "sharply conflicts" with decisions of other courts is the court of appeals' purported failure to "grasp the distinction between the operation of the fundamental or plain-error exception for procedural bars and a plenary merits review." Pet. 19. In an effort to create an issue worthy of this Court's review, petitioners mischaracterize this case and the surrounding law.

Petitioners misinterpret *Park* to hold that a state fundamental error exception must always be interpreted to encompass a "plenary" merits review. *See, e.g.*, Pet. 9 ("[The Ninth Circuit's interpretation of *Robbins*] transforms a commonplace, limited, discretionary state procedural rule into a mandatory, plenary merits review rule for all alleged federal constitutional errors in all cases."). But far from holding that the state fundamental error exception mandated a "*plenary* merits review," the Ninth Circuit faithfully followed the state supreme court's statements in *In re Harris* and *In re Robbins* indicating that, in pre-*Robbins* cases, the fundamental

constitutional error exception necessarily involved a merits review.

None of the authorities offered as evidence of an intercircuit conflict survives scrutiny. Petitioners' discussion of allegedly conflicting dicta from this Court's decisions and allegedly conflicting authority from other circuits neglects to mention that most of those decisions depend entirely on the vagaries of the particular state procedural rule and factual context at issue, and are therefore readily distinguishable from the case at bar. Petitioners assert that *Park* conflicts with dicta from this Court's decisions in *Sochor v. Florida*, 504 U.S. 527 (1992), and *Engle v. Isaac*, 456 U.S. 107 (1981), but neither of those decisions stands for the broad proposition "that a review for 'fundamental constitutional error,' especially as a possible exception to a state procedural bar, is simply not a merits review." Pet. 20. Each turned on the particular contours of the state procedural bar at issue. In *Sochor*, the defendant's constitutional claim fell into a category of claims that the State's courts had already determined *did not* satisfy the fundamental error exception to Florida's procedural bar. 504 U.S. at 534 n.10. Unlike in *Park*, there was no basis for inferring that the state's application of the procedural bar to that particular defendant's claim implied any ruling on the merits. *Id.* Similarly, in *Engle*, this Court declined to find that the Ohio state court's application of a procedural bar encompassed an implicit ruling on the defendant's federal constitutional claims because the Ohio Supreme Court had previously held the *type* of constitutional error claimed by the defendant did not fall within the "plain error" exception to that bar. *Id.* at 125. Thus, unlike in *Park*, the state's procedural bar constituted an independent state law ground of decision.

Petitioners also ignore binding precedent of this Court that reached the same result as *Park* in an analogous case. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that the Oklahoma Supreme Court's application of a state procedural bar was not independent of federal law. Pursuant to state court interpretation of its own procedural bar rules, the state court

was required to reach the merits of the defendant's constitutional claims: "Under Oklahoma law, . . . federal constitutional errors are 'fundamental.' . . . Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question." *Id.* at 75. Like the Oklahoma doctrine considered by the *Ake* Court, California's fundamental error exception encompasses a merits review of federal claims. *See infra.*[7] As in *Ake*, before applying the pre-*Robbins Dixon* bar to Park's claims of constitutional error, the California Supreme Court had to rule, "either explicitly or implicitly, on the merits of" Park's claims. The *Park* court's holding that the California waiver doctrine did not constitute an independent state law ground prohibiting federal review is therefore entirely consistent with this Court's jurisprudence.[8]

Rather than acknowledging *Ake*, petitioners cite court of appeals decisions considering state procedural rules that differ materially from the pre-*Robbins Dixon* rule. In *Mu'Min v. Pruett*, 125 F.3d 192 (4th Cir. 1997), the Fourth Circuit rejected the

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7. *In re Winchester*, 348 P.2d 904 (Cal. 1960), on which petitioners rely, Pet. 22, for the proposition that "[t]here is no doubt that California has traditionally defined its fundamental error review as a state law process," Pet. 22, is not to the contrary. *Winchester* merely held that the particular claimed error — the "denial of a fair and impartial trial" — amounted to a violation of the State Constitution, and therefore fell within the constitutional error exception. Nowhere did that case indicate that the constitutional error exception was interpreted exclusively by reference to state law.

8. Although *Ake* was a decision involving a procedural default on direct review, the adequate and independent state law ground doctrine applies equally to claims on habeas and direct review. *See Harris v. Reed*, 489 U.S. 255, 263 (1989) ("Although *Long* and *Caldwell* arose on direct review, the principles underlying those decisions are not limited to direct review . . . [T]he problem of ambiguous state-court references to state law, which led to the adoption of the *Long* 'plain statement' rule, is common to both direct and habeas review.").

defendant's argument that the state court implicitly considered the merits of his federal constitutional claims when it conducted a mandatory review of his death sentence. Under the Virginia state law procedural bar at issue, mandatory review did "not require the court to examine the record for constitutional errors not specified on appeal." *Id.* at 197 (emphasis added). Because the constitutional errors asserted in the defendant's federal habeas petition had not been specified on appeal, the mandatory review was an independent state law ground of decision. *See also McCown v. Callahan*, 726 F.2d 1, 3-4 (1st Cir. 1984) ("review by the [Massachusetts state court] under a 'miscarriage of justice' standard does not automatically waive the state's 'contemporaneous objection' rule, for in conducting the review the state court typically applies state, not federal law," and the state court's "conclusion here clearly rests upon state cases that it cites"); *Simpson v. Matesanz*, 175 F.3d 200, 207 & n.4 (1st Cir. 1999) (state court's application of procedural bar exception for "new and substantial" claims was independent of federal law because determination that claims were not "new" was made exclusively by reference to state law; if denial had rested on "a finding that while petitioner's claim is new, it is, nonetheless, *not substantial* — a conclusion reached by analysis under and resting on federal law[,] [i]t could be cogently argued that such a denial does not rest *purely on state law* and so is not independent") (emphasis added); *Gutierrez v. Moriarity*, 922 F.2d 1464, 1469 (10th Cir. 1991) (stating in dicta that, under New Mexico procedural law, the "question of fundamental error" is "defined by state law," and is therefore an independent state law ground, but holding that the procedural bar was not an "adequate" state ground); *Willis v. Aiken*, 8 F.3d 556, 567 (7th Cir. 1993) ("Like New Mexico, [but unlike Oklahoma], Indiana mandates review on the merits of fundamental rights claims only when the denial of the right 'gives rise to a question of fundamental error as *defined by state law*.' ") (citing *Gutierrez*, 922 F.2d at 1469) (emphasis added).

Finally, contrary to petitioners' claim that the Seventh Circuit, in *Neal v. Gramley*, 99 F.3d 841 (7th Cir. 1996), "noted that Illinois, *like California* and many other states, 'provides a safety valve for situations in which enforcing a procedural default would mask a plain error,' " Pet. 21 (quoting *Neal*, 99 F.3d at 844 (emphasis added)), the decision in that case concerned only discusses *Illinois* procedural default law. The difference in result in that case, as in the other cases cited by petitioners, can be explained by the differences between the specific state procedural rule at issue and the pre-*Robbins Dixon* rule. In cases applying the prospective rule announced in *Robbins*, the Ninth Circuit may well find that the *Dixon* rule is now analogous to the state procedural rules in states like New Mexico, Indiana, and Illinois. But as to the pre-*Robbins* rule, the court of appeals was correct to hold that the denial of Park's petition was not an independent state law basis.

Other cases cited by petitioners are inapplicable because they merely rejected arguments that were considerably broader than *Park*'s limited holding. *See Tarver v. Hopper*, 169 F.3d 710, 713 (11th Cir. 1999) (" 'The *mere existence* of a 'plain error' rule does not preclude a finding of procedural default,' however. Likewise, state post-conviction proceedings do not preclude a finding of procedural default. [Defendant's] argument would allow federal review of procedurally defaulted claims in every state with state post-conviction proceedings.") (emphasis added, citation omitted); *Wilson v. Moore*, 178 F.3d 266, 276-277 (4th Cir. 1999) (rejecting defendant's argument that South Carolina's "fundamental fairness" procedural bar necessarily required a merits review of his claims because, "[a]ccording to [defendant's] argument, habeas petitions invoking the original jurisdiction of the South Carolina Supreme Court are free of procedural strictures and can never be rejected on procedural grounds under any circumstances"). *Park* does not conflict with *Tarver* or *Wilson* because it did not hold that the *mere existence* of California's fundamental constitutional error exception or

the mere availability of state habeas review precludes a finding of default.[9]

In sum, none of the decisions cited by petitioners holds that it is categorically unreasonable to conclude that a state court implicitly reviewed the merits of a petitioner's constitutional claims when it applied a fundamental or plain error exception to its state procedural bar. Instead, those courts held that the state's application of the procedural bar was independent of federal law because (1) the exceptions to the state's procedural bar were defined exclusively by reference to state law, (2) the constitutional error asserted in the defendant's petition was of a type that, as a matter of state law, was excluded from the relevant plain/fundamental error exception, or (3) the defendant's argument that the existence of a plain error exception to a default rule necessarily opened the defendant's habeas claims to federal review was overbroad. None of the decisions involved California law, and none of them contradicts or even speaks to *Park*'s core holding that the state court's application of the *Dixon* procedural bar to Park's claims was not a clear and unambiguous statement of the court's reliance on an independent state law ground.

c. *No impingement on state court's prerogative to define state procedural bars.* Petitioners imply that the *Park* decision prevents state courts from defining their procedural default rules as they see fit. *See, e.g.*, Pet. 22 (" '[A] state's efforts to stop gross miscarriages of justice should not suddenly force it to grapple with complex federal issues that its procedural rules would otherwise lawfully bar.' ") (quoting *McCown v. Callahan*, 726 F.2d 1, 3-4 (1st Cir. 1984)). The court of appeals' opinion in no way prevents the state court from crafting a procedural bar

9. The Tenth Circuit's decision in *Andrews v. Deland*, 943 F.2d 1162 (10th Cir. 1991), did not even consider the question addressed by *Park*. *See id.* at 1189 ("The focus of [defendant's] challenge to Utah's procedural default rules is on the adequacy of those rules, not their independence from federal law. We accordingly *do not address their independence*.") (emphasis added).

that is independent of federal law. The court of appeals faithfully adhered to *Robbins*' pronouncement of a prospective rule and to its acknowledgement that prior state court interpretation of the fundamental constitutional error exception was not independent of federal law. *Robbins* is the state court's attempt to articulate a prospective reinterpretation of the *Dixon* bar that is truly independent of federal law. Because the court of appeals' decision expressly declined to reach the issue of whether that attempt had succeeded, its decision in *Park* can in no way be construed as an effort by the court of appeals to impinge upon the state court's prerogative to define its procedural bar rules as it sees fit.

d. *Mere error correction.* In sum, petitioners' arguments amount to a request that this Court engage in mere error correction in a case where the court of appeals correctly applied existing state procedural law. Because all this case concerns is whether a panel of the Ninth Circuit correctly read a State's summary dismissal order, it presents neither a question of national importance nor one that divides the circuits. It is a textbook example of a petition calling for case-specific error correction; something this Court has made clear it is not in the business of doing. *See* Sup. Ct. R. 10 (2000) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").[10]

2. Even the task of error correction would be futile here. The court of appeals correctly held that the state supreme court's summary denial of respondent's habeas petition, supported only by an unexplained citation to *Dixon*, was not an independent

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10. It is also worth noting that the federal petition for writ of habeas corpus in this case was filed on April 22, 1996, before the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214 ("AEDPA"), went into effect. Thus, AEDPA has no application in this case, *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997), further indicating how little this case concerns questions of national importance.

state law ground of decision sufficient to bar federal habeas review. As the court of appeals recognized, state courts applying the *Dixon* exceptions — after *In re Harris* but prior to the state supreme court's recent re-interpretation of that doctrine in *In re Robbins* — "necessarily" considered federal constitutional issues in determining whether the fundamental constitutional error exception was applicable. Petitioners assert (Pet. 15) that *Robbins* stands for the proposition that, "at least since *Clark* and *Harris*, the first three California state-law exceptions" to the *Dixon* procedural bar, including the fundamental constitutional error exception "have been applied with reference to state law." Petitioners' argument rests on a patent mischaracterization of *Robbins*.

First, petitioners quote a passage from *Robbins* stating that, " 'although our orders frequently address the merits when procedural bars apply, commonly they do not. . . . In no event is merit review invariable or obligatory when a procedural bar applies.' " Pet. 13 (quoting *Robbins*, 959 P.2d at 316 n.1); *see also* Pet. 23 (same). Petitioners neglect to mention that this passage is excerpted from a section discussing procedural bars generally, not the fundamental constitutional error exception specifically. Because there are many circumstances under which a state court may have imposed a procedural bar where no federal-law-dependent exception to that bar had been raised, the quoted passage does not support petitioners' contention that, prior to *Robbins*, state courts did not "necessarily" look to federal law in applying the fundamental constitutional error exception.

Petitioners next quote another passage from *Robbins*:

> Although the [fundamental constitutional error] exception is phrased in terms of error of constitutional magnitude — which obviously may include federal constitutional claims — in applying this exception and finding it inapplicable we shall, in this case and in the future, adopt the following

> approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation.

Pet. 14 (quoting *Robbins*, 959 P.2d at 338-39). Under petitioners' view, the court of appeals misinterpreted this passage to mean that, "prior to August 3, 1998," state review of a state habeas petition, "which involved checking for exceptions to state procedural bars, 'encompassed consideration by the court of the merits of federal constitutional questions. . . .' *Park*, 202 F.3d at 1153." Pet. 15. Petitioners also imply that the court of appeals' decision depends entirely upon this alleged misreading of a single passage from a single state supreme court decision. Both contentions are erroneous.

Contrary to petitioners' argument, the court of appeals' interpretation of that passage is correct. By stating that the fundamental constitutional error exception "is phrased in terms of error of constitutional magnitude — which obviously may include federal constitutional claims," and by making clear that its decision was prospective, *Robbins* acknowledged that prior state court interpretation of that exception had encompassed reviewing the merits of constitutional claims.

That reading of *Robbins* is also consistent with the state supreme court's earlier decision in *In re Harris*, on which the court of appeals relied. As the *Robbins* court correctly explained, "No question can exist that *In re Harris* defined fundamental constitutional error by reference to federal law." Pet. App. 49a (citing *Harris*, 855 P.2d at 399, 402); *see also* 855 P.2d at 403 (evaluating the merits of Harris's apparently federal-law-based due process and equal protection claims). Because: (1) Park raised federal constitutional claims in his state habeas petition, (2) California's *Dixon* bar contains an exception for fundamental constitutional error, (3) under *Harris*, prior to *Robbins*, application of the fundamental constitutional error exception included reviewing the merits of constitutional claims raised by a petitioner, and (4) in

imposing the *Dixon* bar, a court must "conclude[ ] that none of the four exceptions set out in [*In re Harris*] apply," *Robbins*, 959 P.2d at 338, the state supreme court's application of the *Dixon* rule in this pre-*Robbins* case was not an independent state law ground.

The remainder of petitioners' procedural bar argument is equally unpersuasive. Their argument that, in a footnote, *Robbins* "used the present tense to explain that 'whenever we *apply* the first three *Clark* exceptions [including the fundamental constitutional violation exception], we do so exclusively by reference to state law'," Pet. 15, ignores the context of that statement. The quoted statement was expressly prefaced with the phrase, "As explained in the text above and following . . . ," *id.* at 339, clearly referring to the passage in the opinion that made *Robbins*' new interpretation of the *Dixon* rule applicable on a prospective basis only. *See Robbins*, 959 P.2d 311, 338-39 ("[I]n applying this exception and finding it inapplicable we shall, *in this case and in the future*, adopt the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation.") (emphasis added). Because the state supreme court's denial of Park's habeas petition occurred prior to *Robbins*, the passage quoted by petitioners is entirely inapplicable to Park.

Even assuming *arguendo* that petitioners were correct that application of the fundamental error exception in pre-*Robbins* cases did not "necessarily" involve issues of federal law, their argument would still fail. Petitioners imply that the court of appeals' decision stands or falls on the proposition that "California's fundamental-constitutional-error exception under *Dixon* or *Harris* requires plenary merits review of all constitutional claims in all cases," and then argue that *Robbins* does not support such a conclusion. Pet. 13. But even if it were true that, prior to *Robbins*, California courts did not conduct an "invariable or obligatory" merits review, Pet. 13, petitioners

cannot dispute the fact that state courts *frequently* conducted such a merits review. *In re Harris*, discussed *supra*, is an example. The *Robbins* court's statement that "the [fundamental error] exception is phrased in terms of error of constitutional magnitude — which obviously may include federal constitutional claims . . . ," 959 P.2d at 338, combined with the statement that its holding should be applied prospectively, at the least reflected that court's recognition that the exception had not previously been applied solely by reference to state law.

The court of appeals in *Park* was therefore correct to "note that the [state supreme court] did not make a clear statement that its decision was based on a bona fide, adequate, and independent ground." Pet. App. 41a (citing *Harris v. Reed*, 489 U.S. 255, 261 (1989)). It is well established that,

> when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [a federal court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Coleman, 501 U.S. at 733 (describing the *Long* presumption that there is no adequate and independent state law ground when the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion"); *see also Reed*, 489 U.S. at 263, ("[T]he problem of ambiguous state-court references to state law, which led to the adoption of the *Long* 'plain statement' rule, is common to both direct and habeas review."). At least until *Robbins* was decided, a mere citation to *Dixon* without elaboration did not provide the plain statement of an adequate and independent state ground necessary to bar federal review.

3. Petitioners' assertion that the court of appeals erred by refusing to certify the state law question is without merit. First, as explained above, the Ninth Circuit followed the state supreme court's own clear statement of its pre-*Robbins* order practice: "When, in our orders, we impose the bars of *Dixon* [or] *Waltreus*, . . . , this signifies that we have concluded that none of the four exceptions set out in [*In re Harris*] apply." *In re Robbins*, 959 P.2d at 340 n.34. That statement in turn refers to the *Harris* decision, which demonstrated that a state court applying the fundamental constitutional error exception would first examine the merits of the constitutional claims alleged. Petitioners do not explain how this authoritative statement of pre-*Robbins* California order practice is to be distinguished away, so there was no unsettled question of state law for the Ninth Circuit to certify.

Second, it is black-letter law that the decision whether to certify a legal question to a state court is left to the discretion of the federal court. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . Its use in a given case rests in the sound discretion of the federal court."). Petitioners have not even alleged an intercircuit conflict on this question, and the courts of appeals that have considered the issue uniformly hold that certification is discretionary and should not be undertaken lightly, even when an unsettled question of state law is raised.[11]

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11. *See, e.g.*, *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976) ("In determining whether to exercise our discretion in favor of certification, we consider many factors."); *United Farm Bureau Mut. Ins. Co., Inc. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1015 n.10 (7th Cir. 1994) ("The decision to grant or deny a motion to certify a question of state law is discretionary"); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 775 n.7 (10th Cir. 1999) (same); *Escareno v. Noltina Crucible & Refractory Corp.*, 139 F.3d 1456, 1461 (11th Cir. 1998) (same).

Certainly, the court of appeals here did not abuse its discretion in refusing to certify a question on which the state's highest court had already issued an authoritative interpretation.

Petitioners rely primarily on *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). *Arizonans* presented an extreme scenario in which a federal court refused to certify a state law question and then invalidated a new state statute on federal constitutional grounds without permitting any state court to provide a saving construction of the law. *See id.* at 79. Here, by contrast, the *Park* court merely applied a longstanding state rule in conformity with the authoritative interpretation given that rule by the state's highest court.

Fiore v. White, 120 S. Ct. 469 (1999), is similarly unhelpful to petitioners. In *Fiore*, the petitioner and his co-defendant were convicted under state law at the same state court trial of operating a hazardous waste facility without a permit. Each defendant appealed to a different state appellate court. The petitioner's conviction was affirmed, and the state supreme court denied further review. The co-defendant's conviction was reversed, and the state supreme court affirmed, finding that the state statute did not apply to one who possessed a permit but deviated radically from its terms. The state supreme court did not specify whether or not its holding applied retroactively. After the state courts refused to reconsider the petitioner's identical conviction, he sought federal habeas relief. The district court granted his petition, but the court of appeals reversed. This Court certified to the state supreme court the question whether the state court's holding was retroactive and therefore applied to the petitioner's conviction. *See id.* at 472-73. The opposite result applies here, where the California Supreme Court had already issued a decision authoritatively stating that its new interpretation of the *Dixon* rule applies prospectively only, and explicitly recognizing that prior state court interpretation was different or at least ambiguous.

4. The court of appeals correctly held that Park's federal constitutional claims were not barred by this Court's decision in *O'Sullivan*. Petitioners argue that, because Park did not raise his claims on direct appeal, those claims are barred as a matter of federal law regardless of the grounds on which the state court denied his habeas petition. *See* Pet. 10, 24. Petitioners also misleadingly cite this Court's recent decision in *Edwards v. Carpenter*, 120 S. Ct. 1587, for the proposition that "Park's failure to abide by California's *Dixon* rule is the failure of fair presentation described in *O'Sullivan* and *Edwards*." Pet. 24-25.

Petitioners' analysis conflates the twin doctrines of exhaustion and procedural default. Both doctrines serve federalism and comity interests, but "the problem of waiver [*i.e.*, procedural default] is separate from the question whether a state prisoner has exhausted state remedies." *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). The exhaustion doctrine requires that a federal court refrain from addressing a habeas petitioner's claims if there are remaining state court remedies *presently* available to the petitioner.[12] At the time the court of appeals considered Park's claims, Park no longer had any available remedies in state court, and therefore the exhaustion requirement was satisfied. *See Edwards*, 120 S. Ct. at 1592 (habeas petitioner's failure to abide by state procedural rules did not change the fact that he had " 'concededly exhausted his state remedies' "); *Engle*, 456 U.S. at 125 n.28 (exhaustion doctrine "refers only to remedies still available at the time of the federal petition").[13]

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12. *See* 28 U.S.C. § 2254(c) (employing present tense to codify the rule that a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he *has the right* under the law of the State to raise, by any *available* procedure, the question presented") (emphasis added).

13. *See also Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him.").

The procedural default doctrine, on the other hand, pays credence to federalism and comity interests by looking to a state court's own procedural default rules (not federal law) to determine whether a petitioner's claims were *properly* presented to the state court. It is true that "vigilant enforcement of a state's procedural default rules is necessary to protect the integrity of the federal exhaustion requirement." Pet. 24. (citing *O'Sullivan*, 526 U.S. at 845-847). Otherwise, a petitioner could simply " 'let[] the time run' so that state remedies were no longer available," *Edwards*, 120 S. Ct. at 1592, and then seek habeas relief in federal court. Therefore, if claims were not properly presented pursuant to state law, the procedural default doctrine requires the federal court to apply or uphold the state court default rule *if* the rule constitutes an adequate and independent state law ground.

Under a correct interpretation of the exhaustion doctrine, Park's claims were exhausted by the time he filed his federal habeas petition because he no longer had any state court remedies available to him. Additionally, the state supreme court had already held that his claims had not been *properly* presented to the state court and therefore were procedurally defaulted under *Dixon*. As a result, the only inquiry remaining for the court of appeals was to determine whether the state court's holding that Park's claims were procedurally defaulted constituted an adequate and independent state law ground. On that issue, the court of appeals correctly held that the state's procedural default doctrine was not independent of federal law.

Petitioners erroneously posit that "[t]he determination of whether to impose [the *O'Sullivan*] bar does not depend on the complex questions of independence and adequacy, or the 'plain statement' rule of [*Harris v. Reed*]." Pet. 25-26. In support, petitioners quote — entirely out of context — language from *Coleman* footnote 1. *See* Pet. 26 (quoting *Coleman*'s statement that *Long*'s plain statement rule does "not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present is claims in order to

meet the exhaustion requirement would not find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas *regardless* of the decision of the last state court to which the petitioner actually presented his claims."). Petitioners' argument is flawed from the outset because the passage quoted refers only to the *Long* "plain statement" presumption and not to the adequate and independent state law ground doctrine itself. *See* 501 U.S. at 735 n.1.

Moreover, even with regard to the *Long* presumption, a close reading of the *Coleman* passage makes clear that its admonition does not apply to this case. The practical reason for the rule articulated in footnote 1 is explained by the footnote's underlying citation to Justice O'Connor's concurring opinion in *Harris v. Reed*, 489 U.S. 255 (1989), in which she stated that it would not make sense to "require a 'plain statement' indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim." 489 U.S. at 268-70 (O'Connor, J., concurring). The citation to *Harris* makes obvious the fact that *Coleman* footnote 1 was not meant to apply at all to a case like *Park* where the state court was given the opportunity both to "pass on . . . the procedural posture" and "the merits of [Park's] constitutional claim[s]." Thus, the *Long* presumption is applicable to this case.

Coleman footnote 1's statement that "there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims," does not imply the existence of a "federal bar" that "goes into effect when the prisoner fails to exhaust his available appellate remedy" and that "is not lifted when he seeks the chance for a discretionary collateral hearing on the basis of a state-law exception to a state procedural rule." Pet. 26. That statement merely refers to the well-established rule that a federal court must faithfully apply state procedural default rules if a state court has not had an opportunity to apply those rules itself. For example, if the petitioner initially raised the federal claims

(*e.g.*, in the trial court, where they were considered on the merits), but later defaulted on those same claims (*e.g.*, failed to raise them again on appeal), and then raised them on federal habeas without first giving the state habeas court a chance to apply the state's procedural default rules, the federal court would be required to apply state procedural default law.[14] Nonetheless, if the state's procedural default rule did not constitute an adequate and independent state law ground, the federal court could evaluate the merits of the federal constitutional claims.

That petitioners are plainly wrong in claiming that the adequate and independent state law ground doctrine does not apply in this case is apparent from this Court's very recent decision in *Edwards*. That case stated that even a claim that had been procedurally defaulted in state court could be reviewed by a federal court if the federal court concluded that the state's procedural rule "does not constitute an adequate procedural ground to bar federal habeas review of the [defaulted] claim." *Edwards*, 120 S. Ct. at 1592.[15] That statement is consistent with numerous prior decisions of this Court. *See, e.g.*, *Reed*, 489 U.S. at 261-62 ("[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an *independent* basis for its disposition of the case.' ") (quoting *Caldwell v.*

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14. In such a case, considering the merits of the federal claims on federal habeas review would be inappropriate if the state procedural default rule is an adequate and independent state ground, notwithstanding the fact that the "last state court to which the petitioner actually presented his claims," *Coleman*, 501 U.S. 735 n.1, (in this hypothetical, the state trial court) addressed those claims on the merits.

15. In *O'Sullivan*, the Court had no occasion to address the adequate and independent state law ground doctrine, so its holding does not speak to this issue.

Mississippi, 472 U.S. 320, 327 (1985)) (emphasis added).[16] Because the court of appeals correctly held that the state procedural bar in this case was not an independent ground, no further review by this Court is warranted.

5. Petitioners' argument that the court of appeals has improperly disrupted federal-state relations — by strictly applying its own procedural bar, while holding that California's "identical" state procedural bar does not preclude federal review — is no more persuasive. Petitioners misconstrue this Court's decisions in *Coleman v. Thompson*, 501 U.S. 722 (1991), *Francis v. Henderson*, 425 U.S. 536, 542 (1976), and *Reed v. Farley*, 512 U.S. 339 (1994). None of those decisions stands for the proposition that comity prohibits a federal court from reviewing the independence of a state procedural bar simply because the federal court happens to apply a similar procedural bar to federal defendants. The existence of the federal bar is irrelevant to the issue of whether the state court clearly and unambiguously relied on an adequate and independent state law ground in denying the defendant's habeas petition. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (state defendant's habeas claims subject to federal review because state procedural bar was not independent of federal law); *Reed*, 489 U.S. at 263 (same). Prior to the new interpretation of *Dixon* offered in *Robbins*, it was impossible for a federal court to discern from the state supreme court's terse denial order in *Park* whether that decision clearly rested on an independent state law ground. Thus, it was appropriate for the federal court to permit review of Park's claims, regardless of the existence of similar federal default rules.

Moreover, petitioners misunderstand the scope of the *Park* holding. The court of appeals did not hold that California may

16. *Cf. Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("State procedural bars are not immortal [and] may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.").

not impose a procedural bar similar to that imposed upon federal criminal defendants, nor did the court even reach the question whether the *Dixon* bar would be subject to federal review in post-*Robbins* cases. The court narrowly held that, at the time of Park's state habeas petition, California's application of the fundamental constitutional error exception implicated questions of federal law. The *Park* decision in no way impinges on the ability of the state supreme court to define its procedural bar rules as it sees fit, and to define those rules exclusively by reference to state law if it chooses to do so. Because, however, the state court had not clearly defined those rules by reference to state law prior to its prospective decision in *Robbins*, the court of appeals correctly held that the state procedural bar in this pre-*Robbins* case did not constitute an adequate and independent state law ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 99-1971

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

vs.

DON SOON PARK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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29pp

QUESTIONS PRESENTED

Does a state procedural default rule lack independence from federal law because it makes an exception for "fundamental error," when "fundamental," as defined by state law, excludes most federal constitutional claims?

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

vs.

DON SOON PARK,
Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

California's procedural default rules are necessary for efficient and timely resolution of an appellant's claims. The Ninth Circuit's refusal to respect these rules in the present case has set a precedent which will needlessly delay enforcement of the state's death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

August, 2000

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

vs.

DON SOON PARK,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

On August 20, 1991, Don Soon Park and two accomplices attempted to rob Munho Kim in the garage of his residence. The two accomplices were caught while fleeing the scene, but Park, the getaway car driver, escaped. *Park* v. *California*, 202 F. 3d 1146, 1148 (CA9 2000), App. to Pet. for Cert. 39a-40a. A year later, Park threatened to blow up the store of Keum Kim and kill her and her family unless she paid him for a debt owed by her son and for alleged defamation by her granddaughter. The store was later destroyed by a pipe bomb. *Ibid.* Park was convicted of conspiracy, burglary, and attempted robbery against Munho Kim and making terrorist threats against Keum Kim, but not of the actual bombing.

Park appealed, claiming only improper joinder of the two cases, and the judgment was affirmed. *Id.*, at 1149, App. to Pet.

for Cert. 41a. After direct appeal was final, Park filed a habeas corpus petition in the California Supreme Court, making three new claims, all of which were based on information available at the time of the appeal and which could have been made then. *Ibid.*

The California Supreme Court, as its usual practice, denied the petition with a citation to *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513 (1953). That citation is, in California practice, an unmistakable reliance on a state procedural default rule, specifically that claims that could have been raised on appeal but were not will generally not be considered on habeas.

On federal habeas, the District Court denied the joinder claim on the merits and the other three as procedurally defaulted. *Park*, *supra*, 202 F. 3d, at 1148, App. to Pet. for Cert. 38a. The Court of Appeals reversed the procedural default ruling. It held that the "fundamental constitutional error" exception to the *Dixon* rule rendered that rule not independent of federal law. It interpreted *In re Robbins*, 18 Cal. 4th 770, 959 P. 2d 311 (1998) as indicating that, prior to *Robbins*, the California Supreme Court "necessarily made an antecedent ruling on federal law before applying the *Dixon* bar . . . by concluding that no *fundamental* federal constitutional error had occurred." *Park*, 202 F. 3d, at 1153, App. to Pet. for Cert. 50a (emphasis added).

SUMMARY OF ARGUMENT

The Ninth Circuit's assertion that California courts, in the process of applying the procedural default rule, *necessarily* resolved the merits of any federal constitutional claim, is clearly mistaken. Nothing in the case cited for this proposition says or implies that, and the prior case law is unambiguously to the contrary.

The relation between "fundamental error" or "plain error" exceptions to default rules and the independence of such rules

requires clarification from this Court. The Seventh Circuit has expressly requested clarification in this area. The circuits are divided on the point, although the clear weight of authority is contrary to the Ninth Circuit's position.

ARGUMENT

"No good deed goes unpunished" is the theme of the Ninth Circuit's decision in this case, and in other cases negating California's procedural default rules. Because California has been generous to the indigent, the illiterate, the unrepresented, and others presenting particularly worthy claims for relief, the state must now forfeit its entire body of rules governing procedural default on appeal. Claims never properly presented to state courts by defendants who were provided counsel, ample opportunity, and clear rules on when and how to present them, must now be litigated in federal court, when such claims would have been terminated in less generous states. This perverse result is contrary to the letter and spirit of the "adequate and independent state grounds" doctrine.

I. California does not have, and has never had, an exception for all constitutional claims.

The Ninth Circuit's decision is based on a patently false premise. The court interpreted a statement in a California Supreme Court decision as holding that in applying "the constitutional error exception" to the procedural default rule, the state habeas court "necessarily made an antecedent ruling on the federal law . . . ." *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000), App. to Pet. for Cert. 50a.[1] An elementary survey of California habeas law reveals the error of this statement.

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1. In other words, the Court of Appeals equated California's rule with the Oklahoma rule involved in *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985).

In *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (dissenting opinion), Justice Stevens proposed that a small subset of constitutional claims be deemed so fundamental that they be undefaultable. "Errors of this kind justify collateral relief . . . even though they may not have been preserved properly . . . ." The "category cannot be defined precisely," but it includes mob-dominated trials, known perjury, and brutally extorted confessions. *Ibid.* This exception has not been adopted on the federal level, but one along these lines has been adopted in California. The Ninth Circuit's inability, or unwillingness, to see the distinction between "fundamental," in this sense, and "constitutional" is the root of its error.

A. The Dixon Default Rule.

California's basic rule on availability of habeas is simple. It was clearly stated by Justice Traynor over half a century ago, in the context of a federal due process claim. "A violation of the defendant's constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a habeas corpus proceeding *if the petitioner has no other adequate remedy* to test the constitutionality of the proceedings resulting in his conviction (*In re Bell*, 19 Cal. 2d 488, 494[, 122 P. 2d 22, 26 (1942)] . . . .)." *In re Wallace*, 24 Cal. 2d 933, 938, 152 P. 2d 1, 4 (1944) (emphasis added, additional citations omitted). The italicized clause encompasses the procedural default rule. On constitutional questions, "the court may in its discretion refuse to grant the writ if the remedy by appeal is not exhausted." *Bell*, 19 Cal. 2d, at 495, 122 P. 2d, at 27. This discretionary basis for the procedural default rule is consistent with the federal counterpart. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 497 (1986) ("means of channeling the discretion of federal habeas courts").

In re Dixon, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953) did not create the procedural default rule but merely applied settled law, holding "in the absence of special circumstances constituting an excuse . . . , the writ will not lie where the

claimed errors could have been, but were not, raised upon a timely appeal . . . ." It was already settled by that time that the rule applied to constitutional claims generally. See *id.*, at 761, 264 P. 2d, at 515. The *Dixon* court noted a possible exception for "*fundamental* constitutional rights," *id.*, at 760, 264 P. 2d, at 515 (emphasis added), but it did not need to dwell on the fundamental/nonfundamental distinction because the factual basis of Dixon's claims had already been resolved against him. *Id.*, at 760-762, 264 P. 2d, at 515-516.

Park maintained in the Court of Appeals that the *Dixon* Court denied the claim on the merits, but a close examination reveals that the court did not itself resolve any disputed question of law or fact on the underlying claim. Instead, the Court noted that the facts had been previously adjudicated, *id.*, at 761, 264 P. 2d, at 515-516, and that because of the default Dixon was not entitled to reconsideration of the facts. *Id.*, at 762, 264 P. 2d, at 516. The "difficult questions of law" presented by petitioner's version of the facts, *ibid.*, therefore did not need to be addressed. This is a ruling in the nature of collateral estoppel rather than *de novo* adjudication of the "merits" as that term is normally understood.

The "fundamental" exception had been invoked the year before in *In re James*, 38 Cal. 2d 302, 240 P. 2d 596 (1952). This was a claim of complete denial of counsel to an indigent murder defendant. See *id.*, at 307-308, 240 P. 2d, at 599-600. The court excused the failure to appeal by this borderline literate defendant based on the fundamental nature of the right to counsel. See *id.*, at 309-310, 240 P. 2d, at 600-601. The California courts' extra solicitude for denial-of-counsel claims, above that for other constitutional claims, is entirely in keeping with this Court's jurisprudence. See *United States* v. *Morgan*, 346 U. S. 502, 512 (1954) (common law coram nobis for denial of counsel claims); *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991) (included in small set of errors deemed "structural" and never harmless); *Custis* v. *United States*, 511 U. S. 485, 496 (1994) (violation of rule of *Gideon* v. *Wainwright*, 372 U. S.

335 (1963), a "unique constitutional defect," is only claim cognizable in attack on prior at sentencing for new offense); *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (*Gideon* as exemplar of rule qualifying for second exception to rule of *Teague* v. *Lane*, 489 U. S. 288 (1989)). To the same effect is *In re Lopez*, 2 Cal. 3d 141, 151, 465 P. 2d 257, 263 (1970), noting the special status of *Gideon* claims. By no stretch of the imagination does this appropriate generosity for *Gideon*-type claims translate to a waiver of default for all constitutional claims.

The 1960s saw the creation of a number of nonfundamental federal constitutional rules of criminal procedure. The first and foremost of these is *Mapp* v. *Ohio*, 367 U. S. 643 (1961), a rule which actually detracts from, rather than enhances, the accuracy of the result of the trial. See *Stone* v. *Powell*, 428 U. S. 465, 489-491 (1976). *In re Lessard*, 62 Cal. 2d 497, 399 P. 2d 39 (1965) presented the question of whether claims under the exclusionary rule, now constitutionalized and applicable to the states, would be considered despite default. The court held that such claims would be barred if they were defaulted at trial or on appeal. *Id.*, at 503, 399 P. 2d, at 43. Lessard's claim was independently barred on both grounds. *Ibid.*; accord, *In re Sterling*, 63 Cal. 2d 486, 489, 407 P. 2d 5, 8 (1965).

Mapp and *Gideon* are the "polar extremes" on the fundamental/nonfundamental continuum. See *In re Harris*, 5 Cal. 4th 813, 831, 855 P. 2d 391, 399 (1993). While the California Supreme Court never expressly drew the line between them before *Harris*, it is clear that most claims fall on the nonfundamental side. *In re Shipp*, 62 Cal. 2d 547, 551-552, 399 P. 2d 571, 575 (1965) applied the *Dixon* rule to an involuntary confession claim. *In re Ronald E.*, 19 Cal. 3d 315, 321-322, 562 P. 2d 684, 688 (1977) applied the default rule to a claim under *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

The independence of the procedural default rule from the merits of the federal constitutional claim is abundantly clear from these cases. In *Shipp*, the petitioner's allegations, if true, would unquestionably amount to a violation of both due process

and the Fifth Amendment. See *Shipp*, *supra*, 62 Cal. 2d, at 550-551, 399 P. 2d, at 574. Yet the court held that there were "three fundamental reasons why the writ should not issue: first, habeas corpus cannot serve as a substitute for appeal in the absence of special circumstances; second, petitioner neither specifies such special circumstances nor alleges the reasons for his delay in this late presentation, and, third, the recent decisions of the United States Supreme Court do not call for any different resolution of the issue." *Id.*, at 551-552, 399 P. 2d, at 575.[2] Yet Shipp certainly *did* specify a federal constitutional claim, and a meritorious one if his allegations were true. *Shipp* thus holds that a meritorious federal constitutional claim alone does not amount to an exception from the *Dixon* rule. The rule may bar the claim independently of the merits.

Even more clear is *In re Ronald E.*, *supra*. In that case, the prosecution conceded that Ronald *did*, at one time, have a meritorious *Boykin* claim. *Ronald E.*, *supra*, 19 Cal. 3d, at 321, 562 P. 2d, at 688. Yet the court held the claim barred despite the merits, due to failure to appeal. *Id.*, at 321-322, 562 P. 2d, at 688. If a court can deny a claim despite conceded merits, then it can certainly deny a claim without addressing the merits.

California law up through 1993 was clear on the point relevant to this case. The *Dixon* rule was a standard procedural bar against raising, on habeas, claims defaulted on appeal. The rule had generous exceptions, including one for "fundamental" claims, but a decision that a claim did not qualify for the exceptions did not require resolution of the merits of a federal constitutional question.

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2. The last point refers to the 1963 habeas "trilogy." See *id.*, at 553, 399 P. 2d, at 576 (citing *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963); *Sanders* v. *United States*, 373 U. S. 1 (1963)).

B. The Waltreus Reconsideration Rule.

A related but distinct rule is the rule that a claim considered and rejected on appeal will not be considered again. *In re Waltreus*, 62 Cal. 2d 218, 225, 397 P. 2d 1001, 1005 (1965) is traditionally cited for this rule, although that case merely applied settled law.

There are important differences between the default rule and the reconsideration rule, however. A claim barred from further consideration in state court by *Waltreus* has been exhausted and may proceed on federal habeas. It is not defaulted. See *Fields* v. *Calderon*, 125 F. 3d 757, 762, n. 5 (CA9 1997). More importantly, for the purpose of this case, California courts before 1993 were more expansive with the exceptions to *Waltreus* than they were with *Dixon*.

In re Winchester, 53 Cal. 2d 528, 531, 348 P. 2d 904, 906 (1960) involved a habeas petition "based upon the same grounds as those urged . . . on the appeal." The opinion indicates that reconsideration "even after affirmance on appeal" is available for defects which "violate the fundamental aspects of fairness and result in a miscarriage of justice." *Id.*, at 531-532, 348 P. 2d, at 906. The court does not elaborate on this, as it ultimately rejects the claims on the merits. *Id.*, at 535, 348 P. 2d, at 909.

In re Jackson, 61 Cal. 2d 500, 393 P. 2d 420 (1964) expressly distinguishes repeated claims from defaulted claims. "We do not engage in the kind of rescue operation in which a petitioner asks a court to issue a writ to salvage an effective point which he missed or waived." *Id.*, at 506, 393 P. 2d, at 423. *Jackson* quotes *Sunal* v. *Large*, 332 U. S. 174, 181 (1947) as support for the different treatment. *Id.*, at 506, n. 4. Therefore, California cases on the scope of exceptions to *Waltreus* before 1993 are not authority for the scope of exceptions to *Dixon*.

The outer limit of the exception to *Waltreus* can be seen in *In re Coughlin*, 16 Cal. 3d 52, 55-56, 545 P. 2d 249, 251

(1976). The court proceeded to the merits of a previously litigated claim that revocation of probation for an offense for which the probationer had been acquitted violated due process. This repetitive claim was no more fundamental than the claims routinely rejected for default, see *supra*, at 6, although the decision may have been influenced by the lack of opposition from the prosecution. See *id.*, at 56, 545 P. 2d, at 251. There do not appear to be any California Supreme Court cases similarly waiving the *Dixon* rule for such a routine claim.

C. In re Harris.

The California Supreme Court's decision in *In re Harris*, 5 Cal. 4th 813, 855 P. 2d 391 (1993) is clear enough on its face, but it becomes even more clear in light of the foregoing history. *Harris* unambiguously narrowed, rather than expanded, the "fundamental" exception to *Waltreus*, and the narrowed exception also applies to *Dixon*. An interpretation of *Harris* to create an *Ake*-type exception for all constitutional claims is unsupportable.

Before discussing *Harris*, we should note that it was decided with a companion case, *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993). *Clark* dealt only with the delayed petition and successive petition rules and expressly disclaimed any consideration of the *Dixon* and *Waltreus* rules. See *id.*, at 768-769, n. 8, 855 P. 2d, at 741, n. 8. For the status of the *Dixon* rule, then, we need only look to *Harris*, in the light of prior default cases.

Harris sought to relitigate on habeas a question resolved against him on appeal. The state cited the *Waltreus* rule, and Harris sought to invoke the *Winchester* exception. See *Harris*, *supra*, 5 Cal. 4th, at 824-825, 855 P. 2d, at 395. The court noted, "much of the following discussion also applies to the so-called '*Dixon* rule'. . . ." *Id.*, at 825, n. 3, 855 P. 2d, at 395, n. 3.

Discussing the history of the *Winchester* exception, *Harris* notes, "Certainly not all alleged constitutional defects warrant the opportunity to relitigate the issue on habeas corpus." *Id.*, at 830, 855 P. 2d, at 399. The court contrasts Fourth Amendment claims, which did not qualify for the exception, with *Gideon* claims, which did. *Id.*, at 830-831, 855 P. 2d, at 399. The distinction is between "fundamental" rights and others; not all constitutional claims are included. See *id.*, at 831-832, 855 P. 2d, at 399.

Harris then reviews how the evolution of ineffective assistance claims has the effect of softening otherwise harsh procedural default rules, diminishing the need for broad exceptions. *Id.*, at 832-834, 855 P. 2d, at 400-402. This conclusion is in harmony with this Court's decision in *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). The *Harris* Court then decided that *Winchester* "is inappropriately broad" and adopted "a narrower exception." 5 Cal. 4th, at 834, 855 P. 2d, at 402. Any interpretation of *Harris* must bear in mind that its exception is expressly narrower than prior law.

Harris then defines the exception as "where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process . . . ." *Ibid.*, citing *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991). Turning to the cited page of *Fulminante*, we see that the court is referring to the very limited subset of constitutional errors referred to as "structural defects." *Gideon* and *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased judge) are the examples cited. The list of nonstructural constitutional claims is much longer, see *Fulminante*, 499 U. S., at 306-307, 311, and it includes very important rights.

Reading *Harris* in light of the history of the exception, its stated purpose to narrow it, and the reference to *Fulminante*, it is clear that the exception as reformulated in *Harris* is far narrower than the one in *Ake* and does not require an examination of the merits of every federal constitutional claim. The latter interpretation would be broader than *Winchester*, rather

than narrower. It would not serve the purpose the *Harris* Court stated for the rule, to "reflect[ ] the proper balance between the state's interest in finality and the individual's interest in vindicating his constitutional rights." *Harris*, *supra*, 5 Cal. 4th, at 834, 855 P. 2d, at 402. Such a rule would completely toss aside the "state's considerable interest." *Ibid.*

The various ways a "fundamental error" claim can be resolved is illustrated by this Court's application of the analogous, although broader, "plain error" rule of Federal Rule of Criminal Procedure 52(b). This rule is, in effect, an exception to the procedural default rule for claims defaulted at trial and asserted on appeal. "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Johnson* v. *United States*, 520 U. S. 461, 466-467 (1997). Further, relief can be granted "only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Ibid.* (some internal quotation marks omitted).

As with other multipronged tests, there is no requirement to take them in order, and a court can stop when it finds any one of the four not met. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984). A court can assume without deciding that an event at trial was "error" and deny the claim for lack of effect on substantial rights, *i.e.*, that defendant did not affirmatively establish prejudice. See *United States* v. *Olano*, 507 U. S. 725, 737, 741 (1993). Such a holding is independent of the merits, because a properly preserved claim of error warrants reversal unless harmless, under a standard much more favorable to the defendant. Cf. *Chapman* v. *California*, 386 U. S. 18, 24 (1967) (constitutional errors); *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946) (nonconstitutional errors). *Johnson*, *supra*, denied relief despite a "plain error," see 520 U. S., at 468, because the error did not meet the fourth criterion. *Id.*, at 469. In the context of the particular case, the overwhelming evidence of guilt was sufficient to negate this prong, there being no "miscarriage of justice."

In some cases, though, a "plain error" argument can be rejected on the basis that there is no error, much less a "plain" error. *Jones* v. *United States*, 527 U. S. 373, 390 (1999) rejected a claim on that basis, with an alternative holding of no prejudice. See *id.*, at 394-395.

While rejection on the merits is a possible mode of denying a "plain error" claim, it would typically not be the most efficient. If the question presents any difficulty, it would be simpler to reject it as not "plain," because "a court of appeal cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Olano*, *supra*, 507 U. S., at 734. Decision of a close question on the merits may be appropriate, despite the inefficiency, if it produces a published opinion settling the question for future cases, as in *Jones*, but this factor would not apply to summary dispositions.

With these principles in mind, we return to the California Supreme Court's decision in *In re Harris*, *supra*. The requirement, again, is that "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process . . . . " 5 Cal. 4th, at 834, 855 P. 2d, at 402. " 'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' " *Olano*, 507 U. S., at 734. The California rule thus incorporates the first two *Olano* elements precisely. The "fundamental" element, though, is more restrictive than "substantial."

With both rules, then, we see that a meritorious claim, *i.e.*, "error," is a necessary but not sufficient condition for relief. *Harris*, like *Jones*, rejected the claim by finding no error. 5 Cal. 4th, at 835-836, 855 P. 2d, at 403. It did not, however, hold or even remotely imply that such a finding was necessary or even the usual mode of addressing claims of exception to the *Waltreus* and *Dixon* rules.[3]

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3. The fact that a "no error" finding is a possible mode of decision raises a more subtle point, which we discuss in part II, *infra*.

D. In re Robbins.

The Ninth Circuit's conclusion that "the California Supreme Court *necessarily* made an antecedent ruling on federal law before applying the *Dixon* bar" in this case, see *Park* v. *California*, 202 F. 3d 1146, 1153 (2000), App. to Pet. for Cert. 50a, was not based on *Harris*, the present case, or any case in existence at the time of the state court's decision in this case. It was instead based on a statement in a case decided three years later, *In re Robbins*, 18 Cal. 4th 770, 959 P. 2d 311 (1998). We may assume for the sake of argument the propriety of looking to a later case to construe an earlier one. But cf. *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958) (act of later legislature not conclusive on construction of earlier act). *Robbins* quite simply does not say what the Ninth Circuit attributed to it.

As noted, *supra*, at 11-12, it is *possible* to dispose of a claim of "plain error" or "fundamental error" by deciding that there was no error at all: plain, fundamental, or otherwise. This Court did so in *Jones*, *supra*, 527 U. S., at 390, and the California Supreme Court did so in *Harris*, *supra*, 5 Cal. 4th, at 833-836, 855 P. 2d, at 403. The question is whether California courts *invariably* denied claims on that basis before *Robbins*.

The *Robbins* case involved the timely petition rule, not the *Dixon* default-on-appeal rule. See 18 Cal. 4th, at 779, 959 P. 2d, at 357. The exceptions to the two rules are not identical, and *Robbins* refers to them separately. See *id.*, at 814, n. 34, paras. 5 & 6, 959 P. 2d , at 340-341, n. 34, paras. 5 & 6. For the present discussion, though, we will assume *arguendo* that the corresponding "fundamental" exceptions of *Harris* and *In re Clark*, 5 Cal. 4th 750, 797-798, 855 P. 2d 729, 760-761 (1993) are equivalent. The *Robbins* court simply announced that, for that case and in the future, the California Supreme Court would no longer take the approach taken by *Jones* and *Harris*. That is, the court will always henceforth take the approach of *Olano*, assuming "error" *arguendo* and asking if

the other requirements of the exception have been met. *Robbins*, 18 Cal. 4th, at 811, 959 P. 2d, at 338-339.

Nothing in this statement says or even remotely implies that in past cases the court *always* took the *Jones/Harris* approach of addressing "error" before the other elements. On the contrary, in footnote 1 the court expressly states that procedural default has often been the basis for rejection of the petition without considering the merits or as an alternative holding to the merits. *Id.*, at 778, 959 P. 2d, at 316.

The Ninth Circuit draws a negative inference about the past from a statement about the present and future. The statement does not support the inference. A statement "we will not do X" may imply "we previously sometimes did X," but by *no* stretch of logic could it be deemed to imply "we always did X." Given the clear history to the contrary discussed in part I A, *supra*, at 4-7, the Ninth Circuit's inference that the post-*Harris*, pre-*Robbins* exception was an *Ake*-type exception rather than an *Olano*-type exception is patently false.

II. The weight of authority holds that similar "fundamental error" or "plain error" exceptions do not negate the independence of state procedural default rules.

If the Ninth Circuit had correctly understood California law, it might have rested its "independence" holding on a ground that is at least arguable. When a claim of "plain error" or "fundamental error" *might* be rejected with a holding that there is no error, there is a split of authority as to whether the rule is "independent." In this part, we discuss the split, and in part III, *infra*, we discuss why it is important that this Court resolve the split.

The Seventh Circuit noted the need for Supreme Court guidance in *Willis* v. *Aiken*, 8 F. 3d 556 (1993). "This case requires that we apply [procedural default] principles to a specific but recurring litigation problem that has *not yet been*

the focus of Supreme Court guidance: when the state court addresses a federal constitutional issue but only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue constitutes 'fundamental error.' " *Id.*, at 561-562 (emphasis added).

Willis involved the Indiana "fundamental error" exception to its procedural default rule. There, as in California, the exception "encompasses matters of federal constitutional law," but "not all federal constitutional errors are deemed fundamental." *Id.*, at 566. "To survive the procedural requirements, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Ibid.* (quoting *Wilson* v. *State*, 514 N. E. 2d 282, 284 (Ind. 1987)). This is, for present purposes, equivalent to the *Harris* rule in California. There must be an error, the error must be "blatant" or "clear," and it must be a fundamental one. *Willis* concluded that the state court's determination in applying this rule "rests on an independent and adequate state ground." *Id.*, at 567. This holding is in clear conflict with the Ninth Circuit's contrary conclusion on an equivalent rule.

Willis agreed with the decision of the Tenth Circuit in *Gutierrez* v. *Moriarty*, 922 F. 2d 1464 (1991). In that case, as in the present case, the habeas petitioner argued that "New Mexico has a fundamental error exception to its procedural bar analogous to the Oklahoma exception . . . in *Ake* v. *Oklahoma*, 470 U. S. 68, 74-75 . . . (1985)." *Id.*, at 1468. The court rejected the analogy because, as in the present case and *Willis*, "unlike Oklahoma, New Mexico does not equate fundamental error with federal constitutional error." *Id.*, at 1469. *Gutierrez* noted the various modes for resolving a "fundamental error" contention, along the lines of our discussion of "plain error." That is, the state court may or may not consider whether there was "error." Compare *ibid.*, with *supra*, at 11-12. "As a general rule, therefore, application of New Mexico's procedural bar rule constitutes an independent state ground because it does

not require a ruling on the merits of the federal claim." *Ibid.* (emphasis in original). As California's resolution of "fundamental error" follows the same lines, this holding is in clear conflict with the holding in the present case.

The Sixth Circuit at one point took a position consistent with the Ninth's in an unpublished opinion, but it has since repudiated that position. In *Scott* v. *Anderson*, 58 F. Supp. 2d 767, 787 (ND Ohio 1998), the District Court held that Ohio's "plain error" rule was not independent, quoting and relying on *Knuckles* v. *Rogers*, No. 92-3208, 1993 WL 11874 (CA6, Jan. 21, 1993) (*per curiam*):

> "The basic inquiry in the plain error analysis in Ohio is whether the defendant has been denied a 'fair trial.' Whether a person is denied a fair trial is a question to be resolved by applying principles of federal constitutional law. Therefore, we conclude that the Ohio appellate court's decision was not independent of federal law."

On appeal, the Sixth Circuit reversed, and it repudiated *Knuckles*, finding it inconsistent with both *Engle* v. *Isaac*, 456 U. S. 107 (1982) and *Coleman* v. *Thompson*, 501 U. S. 722 (1991). *Scott* v. *Mitchell*, 209 F. 3d 854, 867-868 (2000). The Sixth Circuit reads *Coleman* as holding that "the mere reservation of discretion to review for plain error in exceptional circumstances [is not] sufficient to constitute an application of federal law." *Id.*, at 868.

The First Circuit has taken the same position with regard to the Massachusetts "miscarriage of justice" exception. See *Puleio* v. *Vose*, 830 F. 3d 1197, 1200 (1987); *Simpson* v. *Matesanz*, 175 F. 3d 200, 205, 209 (CA1 1999). The Fourth Circuit, resolving the issue left open in *Coleman*, *supra*, 501 U. S., at 741, has held that *Ake* does not apply in the habeas context at all. *O'Dell* v. *Netherland*, 95 F. 3d 1214, 1244 (1996), aff'd on other grounds, 521 U. S. 151 (1997).

There are a few cases leaning in the other direction. *Roy* v. *Coxon*, 907 F. 2d 385, 391 (CA2 1990) found that the Vermont

Supreme Court's application of its plain error rule in the particular case was not independent, but stopped well short of the kind of blanket holding rendered in the present case. The Eighth Circuit has intracircuit split. See *Hornbuckle* v. *Groose*, 106 F. 3d 253, 257 (CA8 1997). One branch is consistent with the weight of authority, *i.e.*, "a properly limited plain error review by a state court does not cure a procedural default." *Toney* v. *Gammon*, 79 F. 3d 693, 699 (CA8 1996). The other branch has a unique twist. It holds that plain error review opens the question to the federal court, but only for "plain error resulting in manifest injustice." *Hornbuckle*, 106 F. 3d, at 257. Again, this is well short of the holding of the present case, which opens *all* defaulted claims in California to full blown litigation in federal court.

In summary, the holding in the present case is contrary to the overwhelming weight of authority from the other circuits. "The ultimate answer to this quandary can, of course, only be supplied by the Supreme Court." *Willis*, *supra*, 8 F. 3d, at 565. This case is a prime candidate for certiorari. Supreme Court Rule 10(a), (c).

III. The Ninth Circuit's severe approach to procedural default creates a perverse incentive and will further obstruct an already clogged system of review.

No other circuit subjects any other state to the kind of "pointless severity," cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), that the Ninth Circuit has applied to California in the present case and related cases. See Pet. for Cert. 11, and n. 3. The reasons for not doing this have been stated in many opinions in other circuits. As then-Judge Breyer wrote for the First Circuit:

> "If federal habeas courts were too ready to find that state 'miscarriage of justice' review constitutes 'waiver' of the state's procedural rules, the state either would have to convert what is often a speedy reviewing task into a full

> scale detailed examination of federal law *or it would have to abandon 'miscarriage of justice' review altogether. The latter alternative seems highly undesirable.* The former conflicts with the theory of *Wainwright* [v. *Sykes*, 433 U. S. 72 (1977)]." *McCown* v. *Callahan*, 726 F. 2d 1, 3-4 (1984) (emphasis added).

"Undesirable" is an understatement. If generosity in exceptions means effective destruction of the rule, imposing on the state the burden of litigating a tidal wave of marginal claims that should have been precluded, the pressure is strong to shut down the exceptions. That result was "undesirable" in 1984, and it is even more so with the limitations placed on federal habeas since then. State habeas should be the principal means of addressing claims that could not be made on appeal and also claims that ought to be considered, despite appellate default, to prevent a miscarriage of justice. The latter exception for rare cases ought not expose the state to litigation of a flood of worthless, defaulted claims. If making an exception for the needle means being buried by the haystack, the state may conclude the needle is not worth the price. Cf. *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the judgment).

Does California have to abolish *all* the exceptions to its procedural default rule, and adopt a rule of uncompromising rigidity, heedless of miscarriages of justice, before the Ninth Circuit respects its rules? This would appear to be the import of this relentless parade of decisions. *Fields* v. *Calderon*, 125 F. 3d 757, 763 (CA9 1997) held the pre-*Harris* rule "inadequate" for allowing discretion without rigid standards. A cutback was made in *Harris*, but the present case holds that was not enough. A further refinement was made in *Robbins*, but the present case ominously threatens that may still not be enough. See *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000), App. to Pet. for Cert. 49a. If the requirement for an adequate, independent exception is going to be moved every time, the only sure way to fix the problem is to repeal all the exceptions.

Other courts have recognized the utter folly of this course. As the Seventh Circuit noted on a related point, an overly severe approach "would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interests of federalism would be served by such a development." *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1384 (1990).

Opposing rehearing in the Court of Appeals, Park maintained that the decision in this case "has little practical effect on the procedural import of a *Dixon* default." Appellant's Response to Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc 17. "*Park* merely extends the effect of *Fields* to 1998 . . . . " *Ibid.* That is, *Park* "merely" extends the complete obliteration of California's procedural default rules for all the cases decided in an additional five-year period.

This statement assumes, first, that *Fields* was correctly decided and its holding will not be eventually overturned by this Court. Although certiorari was denied in that case, see *Calderon* v. *Fields*, 523 U. S. 1132 (1998), that denial says nothing about the merits, and there are many cases remaining in the pipeline which may serve as vehicles to overturn that manifestly erroneous decision. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Calderon* v. *Fields*, No. 97-1262. Even assuming that *Fields* does escape review, though, the impact of this case goes beyond California. As the cases in part II illustrate, many states have similar rules, and this case will serve as a precedent, binding in the other states of the Ninth Circuit and possibly followed elsewhere, to similarly obliterate the procedural default rules of other states for the sin of excess generosity. It will serve as an incentive for other states to curtail or eliminate the exceptions for their default rules until the uncertainty it creates is resolved.

Even within California, the impact is far greater than fits the word "merely." Although this is not a capital case, its impact will be the greatest in those cases. From July 1993 to June

1998, a span slightly less than the interval from *Harris* to *Robbins*, the California Supreme Court decided 71 capital appeals and 155 habeas petitions related to capital appeals. Judicial Council of California, Court Statistics Report 6 (1999). Given the tendency of the capital defense bar to make a plethora of additional claims at every stage of proceedings, this translates to thousands of claims that should be precluded by the default-on-appeal rule, the successive petition rule, the delayed petition rule, or some combination of these. Since the opinion in the present case seems to apply indiscriminately to all these rules, see App. to Pet. for Cert. 47a-50a, all these barred claims will have to be litigated in federal court. This mass of defaulted claims will further contribute to the already atrocious delays that California's capital cases face in federal court, exactly what Congress sought to correct with the Antiterrorism and Effective Death Penalty Act of 1996. See 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein).

This case is important, both for its massive impact on California and for its potential detrimental effects elsewhere.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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